Supreme Court, U.S.
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In The

Supreme Court of the United States

HERIBERTO HERBERT HUERTA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. The United States Court of Appeals for the Fifth Circuit has rendered a decision that is inequitable in violation of the Due Process Clause of the United States Constitution and constitutes a fundamental miscarriage of justice, thereby calling for the exercise of the Supreme Court's supervisory power.

LIST OF ALL PARTIES

The following is a list of all parties to the proceeding in the Court of Appeals for the Fifth Circuit:

1. **HERIBERTO HERBERT HUERTA,** *Defendant/Appellant/Petitioner;*

2. **UNITED STATES OF AMERICA,** *Plaintiff/Appellee/Respondent.*

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OPINIONS BELOW

As to the denial of Petitioner's Title 28 U.S.C. 2255 in the United States District Court, the denial of Petitioner's Motion for Certificate of Appealability in the United States District Court and the Fifth Circuit Court of Appeals, and the denial of Petitioner's Motion for Rehearing En Banc (treated as a Motion for Reconsideration) from the Fifth Circuit Court of Appeals, there are no other reports or opinions. The above-referenced documents and opinions can be found in the Appendix, beginning at App. 1.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Given the Judgment of the United States Court of Appeals for the Fifth Circuit, on the Motion for Reconsideration of the Petitioner's Motion for Certificate of Appealability, dated and entered on August 17, 1999, the jurisdiction of this Honorable Court is invoked under Title 28 U.S.C. §1254(1).

The timeliness of the Petitioner's filing is governed by Supreme Court Rule 13.4.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

In pertinent part, the Anti-Terrorism & Effective Death Penalty Act ("AEDPA") of 1996 established a one-year limitation on filing habeas corpus petitions. The year runs from the latest of the following dates: (1) final judgment on direct review, or "the expiration of the time for seeking such review"; (2) the removal of any state-imposed impediment that unconstitutionally prevented the filing of such a petition; (3) the Supreme Court's recognition of a new, retroactively applicable constitutional right; and (4) the emergence or recognition of any new facts supporting the Petitioner's claim that "could have been discovered through the exercise of due diligence." *See* Title 28 U.S.C. 2254(d)(1)(A)-(D).

In **Lindh v. Murphy**, 117 S.Ct. 2059 (1997), the court ruled that the AEDPA would not be retroactively applied to any non-capital habeas petitions that were pending as of April 24, 1996. The one-year statute of limitations begins to run at the occurrence of any of the four mentioned dates. This application of law has been construed to affect pleadings pursuant to Title 28 U.S.C. 2255 as amended by the AEDPA. See 28 U.S.C. 2244(d), §101.

HISTORICAL PERSPECTIVE WRIT OF HABEAS CORPUS

The origin of the North American Writ of Habeas Corpus is derived from English Common Law and, for centuries, English Judges and legal authorities lavished praise on the Great Writ of Liberty known as the Writ of Habeas Corpus.[1]

Between 1776, when the American Revolution began, and 1787, when the convention in Philadelphia met and drew up the United States Constitution, four states had enacted habeas corpus statues, elevating the writ to the level of a constitutional right. In 1787, during the Philadelphia Convention, the framers inserted the Habeas Corpus Clause into the text of the Constitution. This meant that the United States Constitution was not the first, but the fifth, American Constitution to guarantee habeas corpus as a part of the written fundamental law ("[t]he privilege of Writ of Habeas Corpus shall not be suspended, unless when in case of rebellion or

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[1] *See e.g.*, Darnell's Case, 3 Howell's State Trials 1, 95 (K.B. 1627) (habeas corpus "is the highest remedy in law, for any man that is imprisoned".) (Argument of John Selden).

invasion of the public safety may require it.")[2] Therefore, the Writ of Habeas Corpus, which originated in England in the 14th Century, and which had been bestowed as a right to the English Colonies in North America in the 17th Century, had, by the end of the 18th Century, become an established constitutional right in the United States of America.[3]

During the 18th and 19th Centuries, the jurisdiction of the federal judiciary to grant habeas corpus relief to persons in federal custody rested primarily on two statutes.[4] The first Habeas Statute, Section 14 of the Judiciary Act of 1789, extended the federal Writ of Habeas Corpus to persons in custody "under...the authority of the United States." (Act of September 24, 1789). The second statute, the Habeas Corpus Act of 1867, extended the federal Habeas Writ to

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[2] *See* Paschal, "The Constitution and Habeas Corpus," 1970 Duke L.J. 605 and Chafee, "The Most Important Human Right in the Constitution," 32 Boston U.L. Review 143 (1952).

[3] *See* U.S. Constitution Article I, §9, cl.2.

[4] *See* Longsdorf, "The Federal Habeas Corpus Acts Original and Amended," 13 F.R.D. 407 (1953) and "Habeas Corpus: A Protean Writ and Remedy," 8 F.R.D. 179, 181 (1949).

persons "restrained of [their] liberty...in violation of the Constitution, or any treaty or laws of the U.S.." (Act of Feb. 5, 1867). In 1873, these statutory provisions were codified and placed in a section of the Revised Statutes of 1873 (U.S.Rev. Stat. §753 (1873)), where they remained until modified in 1948 and again codified under 28 U.S.C. 2241 of the United States Code. The Writ of Habeas Corpus §2241 has been suspended since its inception and codification into statute, only in emergency situations. *See* **Ex Parte Zimmerman**, 132 F.2d 442, *cert. denied*, 63 S.Ct. 1027 (C.C.A. 9 Hawaii 1942) (when the Hawaiian Islands were attacked by Japan, the Governor authorized the suspension of the Writ of Habeas Corpus).

Ten years prior to the implementation of the Anti-Terrorism & Effective Death Penalty Act of 1996, there were more than 80 bills introduced into Congress proposing a statute of limitations for federal habeas corpus petitions. *See* **Lonchar v. Thomas**, 517 U.S. 314 (1996). The Suspension Clause of the 10th Amendment determined that no suspension of a Federal Habeas Corpus could occur except during acts of civil unrest. See **Ex Parte Yerger**, 75 U.S. 85 (1868).

The AEDPA radically changed the procedural rules for filing habeas corpus petitions which included a one-year statute of limitation.

Not accompanying the new AEDPA law was how the law would definitively be applied. *See* **Lindh v. Murphy**, *supra*. This gap in the AEDPA left open a plethora of chaotic interpretations of time limitations and unanswered questions as to a Petitioner's rights if a procedural default error occurred, at no fault of the Petitioner, and to his/her detriment, keeping the Petitioner from having their first habeas petition heard.

STATEMENT OF THE CASE

Heriberto Huerta, and 23 codefendants, were named in a 38-count Indictment returned by the Western District of Texas, San Antonio Division, grand jury on May 7, 1993. On November 19, 1993, a Superseding Indictment was filed naming 24 codefendants in 41 counts. Counts One and Two charged 14 codefendants with racketeering in relation to the Texas "Mexican Mafia" prison gang and alleged 11 racketeering acts involving possession with intent to deliver heroin and cocaine, possession of firearms, murder, and assault. The remaining counts charged different co-defendants with various offenses including continuing criminal enterprise, distribution of heroin and cocaine, possession of firearms, money laundering, disposition of a firearm to a person the defendant

has cause to believe is a felon, conspiracy to obstruct justice and to dispose of stolen firearms, aiding and abetting, carrying a firearm during a drug crime, and carrying a firearm during a murder. In addition, counts 40 and 41 direct the defendants to forfeit hundreds of thousands of dollars of criminally derived property to the U.S. All offenses are alleged to have occurred between 1989 and the date of indictment. On May 7, 1993, the government filed a notice of enhanced penalties. It notified all defendants charged in Counts 4, 9, 13 and 14 of enhanced penalties mandated as a result of certain drug amounts.

On January 12, 1994, the District Court granted the government's motion to dismiss the criminal forfeiture counts of the original indictment and the superseding indictment. On January 13, 1994, the government filed an Enhancement Information. It notified **Huerta** that, as a person who had previously been convicted of a felony drug offense, he was subject to a penalty enhancement. Subsequently **Huerta** was charged in Count 1, *Conducting and Participating In The Conduct Of A Racketeer Influenced And Corrupt Organization*, in violation of Title 18 U.S.C. §1962(c); Count 2, *Conspiracy To Conduct And Participate In The Conduct Of a RICO*, in violation of Title 18 U.S.C. §1962(d); Count 4, *Conspiracy To Distribute and Possess With Intent To*

Distribute Heroin, in violation of Title 21 U.S.C. §846; and Counts 16-19, *Aiding and Abetting The Possession With Intent To Distribute A Quantity Of Heroin*, in violation of Title 21 U.S.C. §841(a)(1) & 18 U.S.C. §2.

On February 23, 1994, **Huerta** was found guilty on Counts 1, 2, 4 and 16-19 of the superseding indictment. He was sentenced on May 26, 1994, to the custody of the Bureau of Prisons to a life term of imprisonment on each of Counts 1, 2 and 4, and terms of 30 years' imprisonment on each of Counts 16-19 to be served concurrently with each other, consecutive to a prior federal prison sentence. **Huerta** was assessed a fine of $2,500 on Count 2 of the indictment, and a special assessment of $50 on each count for an aggregate of $350.

An appeal was filed in **Huerta's** behalf, and addressed the following issues:

(i) the district court was clearly erroneous in finding that the government's exercise of seven peremptory strikes, as to Hispanic Venire persons was based upon "race neutral" explanations;

(ii) the use of the peremptory strikes resulted in a racially discriminatory purpose, in violation of the Equal Protection Clause;

(iii) the use of a peremptory strike against a potential juror who had lost the use of one arm violated the Equal Protection Clause and the Americans with Disabilities Act of 1990;

(iv) the district court abused its discretion when an anonymous jury was empaneled;

(v) the district court erred by overruling **Huerta's** Motion To Suppress Wiretap Evidence because the interceptions were not made in compliance with the Order of Authorization;

(vi) the district court erred by permitting the telephone conversations of Emily Mendoza into evidence, as Mendoza was not a co-conspirator;

(vii) the prejudicial effect of the admission of evidence as to the murder of Teo Rangel outweighed the probative value;

(viii) the prejudicial effect of the admission of evidence as to the murder of Chepo Hernandez outweighed its probative value;

(ix) the prejudicial effect of the admission of evidence of the murder or Frank Canales outweighed its probative value;

(x) the prejudicial effect of the admission of evidence relating to the attempted murder of Tye Morales outweighed its probative value; and

(xi) there was an incorrect application of the Sentencing Guidelines through the incorporation if uncharged conduct into the computation of the base offense level.

The Fifth Circuit Court of Appeals affirmed **Huerta's** conviction on October 6, 1995. See U.S. v. Krout, *et al.*, 66 F.3d 1420 (5th Cir. 1996).

Huerta, by and through counsel, submitted a motion pursuant to 28 U.S.C. §2255 to the court, via U.S. mail, on April 23, 1997. Said motion was received in the district court clerk's office and stamped "filed" on April 25, 1997. Given the date of the stamped "filing", along with the strictures of the AEDPA, the Magistrate Judge recommended that the §2255 motion be dismissed as untimely "filed". [App. 1]. After considering the Report and Recommendation [App. 1], along with the objections filed thereto (App. 10), the district court dismissed the §2255 motion on March 13, 1998 (App. 20). A Certificate of Appealability was filed in the district court and subsequently denied. **Huerta** thereafter filed a Certificate of Appealability with the Fifth Circuit Court of Appeals (App. 26) which was denied

(App. 80). Huerta filed a Petition for Rehearing En Banc on the denial of the Certificate of Appealability (App. 81) which was denied (App. 92). This Petition for Writ of Certiorari follows.

ISSUES AND ARGUMENTS

I. **Under the time restraints of the AEDPA, can a first Federal habeas corpus petition be denied based upon the violation of one constitutional right to effective assistance of counsel for procedural default, outside the control of the Petitioner which, in turn, acts as a deprivation of other constitutional rights protected by the Fifth and Sixth Amendments to the Constitution and the Suspension Clause of the Tenth Amendment to the U.S. Constitution.**

Where a first habeas petition is filed with reasonable, yet detrimental reliance on a set of facts, and the petition is dismissed for procedural default out of Petitioner's control, equitable tolling or other remedies should be defined to protect Petitioner's constitutional rights otherwise violated. This matter has not been given adequate and independent review by the lower courts and is in conflict with the United States Constitution

and the fundamental rights of prisoners to access the courts and be protected from events outside their control. *See* **Lonchar v. Thomas**, 517 U.S. 314 (1996). The court, in *Lonchar*, stated that "dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty. *See* **Ex Parte Yerger**, 75 U.S. 85, 8 WALL 85, 95, 19 L.Ed. 332 (1869) (the Writ "has been for centuries esteemed the best and only sufficient defense of personal freedom").

The history of habeas corpus petitions makes plain that prejudice requirement represents a critical element in determining the dismissal of a first habeas petition without reviewing the merits of the case. Additionally, it is a fundamental miscarriage of justice not to consider the merits of a first habeas petition when looking at the unique circumstances presented. *Lonchar* was decided before the passage of the AEDPA but it does not suggest a limitation on equitable relief consistent with unique circumstances, or attempts to file timely though unsuccessful based on detrimental reliance on information from a judicial officer. "The interest in permitting a first habeas petition is quite strong." *Lonchar* at 330. Given the importance of a first habeas petition, it is

particularly important that any rule that would deprive inmates of all access to the writ should be clear and fair. No such fairness is evidenced looking at the circumstances and counsel's detrimental reliance as being the error which caused the defendant to be deprived of first habeas review on the merits. It is difficult for Congress, in establishing a one year time limitation without clarity of retroactivity, to even anticipate the issues that would arise in unique circumstances concerning counsel's representations, something outside the control of petitioner. **Huerta** filed his §2255 petition by and through counsel who mailed the petition and placed it in the care and trust of the United States Postal Service, adequate postage thereon, on April 23, 1997. In good faith, and through due diligence, Appellant's counsel called the district court clerk's office pertaining to **Huerta's** case to determine how the District Court was handling filings, via mail, and how the date of filing is determined from the AEDPA (e.g., date of mailing via postal service or date of delivery). The clerk's office, responding to the inquiry, verified that the date that would be used for purposes of determining the filing of the Federal Habeas Corpus Petition, would be the date that it was mailed in the U.S. Postal Service using adequate postage. Based on this telephone call, and acting in good faith, counsel filed

Huerta's motion through the Postal Service on April 23, 1997.

There was no notice of any new rule that had taken effect in the district court concerning this information as being incorrect (or for that matter within the AEDPA procedural rules). There was no information indicating that a local rule existed changing this interpretation. The presumption, therefore, exists that the proper filing of the petition for habeas corpus relief was evidenced through the exercise of due diligence. Detrimental reliance of the court's instructions cannot act as a bar to habeas relief.

(a) Does procedural default outside the control of a first habeas petition act as an impermissible suspension of habeas corpus in violation of the Suspension Clause of the Tenth Amendment?

Huerta states that the procedural default was based upon excusable neglect and reasonable reliance. The petitioner had no control over counsel's tardy filing and should not be punished for same. The Petitioner was unable to file his first habeas corpus petition because of an external impediment for which he had no control. The AEDPA is not a model of clarity on the issue of

timely filing and it was left up to the Court's interpretation to determine the one year time restriction, as well as what would constitute a filing. Court decisions on this issue were after the one year time limit (4/96 to 4/97). Even if this is of no consequence, the question before this Honorable Court is too serious to ignore relative to protecting the Petitioner from the suspension of his right to habeas review based on procedural default outside his control.

Counsel made all efforts to comply with what rules were known and/or advised. No new rules, or notice, had been established after the AEDPA in terms of expectations of filing, and that "a mailing", prior to the deadline, would not be sufficient. How could the Petitioner know of this consequence if counsel was unaware?

The finding of prejudice is dependent upon the particular facts of a case. The Petitioner can show that the error, whether perceived or real, worked to his actual and substantial disadvantage in effecting his constitutional rights as asserted under the substantive issues of his first habeas petition. See **United States v. Frady**, 456 S.Ct. 152 (1982). In addition, there is a fundamental miscarriage of justice based on procedural default in that the Petitioner has been denied access to the courts, as well as not being given the

opportunity to have the merits of his first habeas reviewed. See **Murphy**, supra. This acts as a suspension of Petitioner's habeas corpus rights in violation of the Suspension Clause of the Tenth Amendment. Such constitutes a fundamental miscarriage of justice. See **Coleman v. Thompson**, 501 U.S. 722 (1991).

(b) Does unique circumstances of detrimental reliance on a judicial officer's instructions allow equitable tolling to avoid deprivation of a first habeas petition in violation of a Petitioner's Fifth and Sixth Amendment rights?

In **Hollins v. Department of Corrections**, 191 F.3d 1324 (11th Cir. 1999), the court has recently stated that *"lenient formulation of the 'unique circumstances' exception concerning the timely filing of habeas corpus petitions can be based upon the reasonable reliance on a judicial officer's assurances of a particular requirement."* See **Pinion v. Dow Chemical, USA**, 928 F.2d 1522, 1529 (11th Cir. 1991). This case provides that any judicial action prior to the expiration of the relevant time period for any appeal, that could have lulled the appellant into inactivity, may permit application of the "unique circumstances exception" and allow for a timely

filing. *Pinion* at 1531 (quoting **Butler v. Coral Volkswagen, Inc.**, 804 F.2d 612, 617 (11th Cir. 1986) (quoting **Willis v. Newsome**, 747 F.2d 605 at 606 (11th Cir. 1984).

In **Freeman v. U.S. Postal Service, et. al.**, 1991 U.S. Dist. Lexis 16787, Case No. 91-C-1459 (Nov. 15, 1991), the court rejected the plaintiff's motion for equitable tolling on the premise that he received a constructive written notice that he had 30 days to file his complaint from the date his EEOC complaint was denied. Freeman went to the court clerk, and was advised that he had 90 days to file his complaint in the Federal Court. Such advice was erroneous in light of the constructive notice received by Freeman from the EEOC with the 30 day time limit identified. In the case at bar, no such constructive notice was received by **Huerta** from Congress, the court or the clerk of the court, concerning the date in which filing would be perfected for habeas petitions under the AEDPA other than the date of mailing per the oral notice received by counsel from the clerk. No local rule suggests otherwise. Without some type of constructive notice that mailing the document in advance of the one-year time deadline would keep the defendant from being able to determine that such a deadline

existed, reliance on the clerk's advice would then be reasonable.[5]

Reasonable reliance on a judicial officer's assurances concerning a particular procedure are grounds for which the court, under unique circumstances, can make an exception and allow the 2255 to be considered timely filed and reviewed.

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[5] The Ninth Circuit has concluded that "the discovery-interrogatory procedure of Rules 26 and 33 is not available in habeas corpus proceedings." **On the other hand, those rules dealing with...and computation of time (Rule 6)**, to the extent that they are relevant, **may be appropriately applied. To a considerable extent the practice probably varies from circuit to circuit and is largely unreported. To that extent guidance must be sought from the clerk of court. In fact, it is *always* a wise precaution to check with the clerk of court if any question arises. The clerk of court is usually an invaluable source of information. *His knowledge of the Federal Rules is usually far superior to that of most lawyers.* In addition, there are many minor matters of procedure about which the rules are frequently silent. When such matters crop up...the answers should be sought from the clerk.** [*Federal Habeas Corpus, A Second and Revised Edition of A Handbook of Federal Habeas Corpus*, Ronald P. Sokol, 1969, pg 145).

The above circuit court opinion makes this court's decision not to consider the "unique circumstances" surrounding reliance on a judicial officer's (Clerk) statement that mailing would be adequate for timely filing reasonable to support the district court reviewing the merits of the Petitioner's first habeas petition.

Based on the totality of the circumstances, and due diligence applied, surrounding the events for which the court determined that the filing of the petition for habeas corpus was not timely, equitable tolling is warranted to avoid a miscarriage of justice, procedural default based on ineffective assistance of counsel, and the violation of one constitutional right (Fifth and Sixth Amendments) to the deprivation of another. (See Suspension Clause of the Tenth Amendment.)

This Honorable Court should review this in conjunction with the Supreme Court decision in **Osterneck v. Ernst & Whinney**, 489 U.S. 169, 179, 109 S.Ct. 987, 993, 103 L.Ed.2d 146 (1989). See also **Thompson v. INS**, 375 U.S. 384, 387, 84 S.Ct. 397, 398-99, 11 L.Ed.2d 404 (1964). The Supreme Court has stated that a situation where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act

has been properly done, should be given consideration for same as a timely filing of the matter in dispute. This is a first habeas, it has statutory significance and is a critical stage in criminal defendants proceedings. Therefore, this Honorable Court should take into consideration these factors in determining this case.

(c) Lack of Notice Should Not Be to a Petitioner's Detriment.

The rules of procedure are not dispositive of this issue. (See Rules 5 and 6 of the Fed.R.Cv.P.). Nothing in Rules 5 and/or 6 compels the conclusion that **receipt** by the clerk of the district court is the moment of filing. (The AEDPA does not speak to this issue independently).

The conclusion is such that **mailing** the document addressed to the clerk of court could also be construed as "filing". The lower courts have, in fact, held that receipt by a district judge, not the clerk, **Halfen v. United States**, 324 F.2d 52, 54 (10th Cir. 1963), or that the former address for the district court clerk, **Lundy v. Union Carbide Corp.**, 695 F.2d 394, 395, n.1 (9th Cir. 1982), serves as filing.

Since no Fifth Circuit Local Rule dictated any different interpretation of compliance than

what was reasonably relied on, **Huerta** should not have been penalized accordingly by denying his habeas review. Additionally, Federal Rule of Civil Procedure Rule 83 states:

"(a) **Local Rules**

(1) Each district court , acting by a majority of its district judges, may, after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice. A local rule shall be consistent with - but not duplicative of - Acts of Congress and rules adopted under 28 U.S.C. 2072 and 2075....

(b) **Procedures When There is No Controlling Law**

A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. 2072 and 2075, and local rules of the district. **No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.**" (Emphasis added).

In the 1995 Amendments to Subdivision (b), it states, "This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. 2072 and 2075, and with the district local rules ... Some courts regulate practice through the published Federal Rules and the local rules of the court...There should be no adverse consequence to a party/attorney, for violating special requirements relating to practice before a particular court unless the party or attorney has actual notice of those requirements ..." (Emphasis added).

Huerta had no notice, other than the clerk's statement to his attorney of record, of which reliance was reasonable. The Act provided no clarity as to retroactive application. Thus, the mailing rule should have been applied, or equitable relief/tolling granted in that **Huerta** entrusted his case to his attorney to file timely, and reasonably believed such would occur. Delivery by counsel or the mail service is no different than delivery by the Bureau of Prisons or mail service for *pro se* litigants. The test is the totality of the circumstances.

(d) Everything Petitioner did, by and through counsel, was based on

information reasonably relied upon by him.

The Petitioner meets the test of equitable tolling which should be applied. The District Court did not consider or recognize its authority to grant relief pursuant to equitable tolling. The District Court should have applied equitable tolling to protect the defendant's rights on his first habeas petition. Equitable tolling has been afforded to defendants in private suits and suits against the United States (§2255 is a civil action against the United States Government for a number of constitutional deprivations). See **Cooper v. U.S. Postal Service**, 471 U.S. 1022 (1985). In **Cooper**, the Court noted that the federal courts have allowed equitable tolling in situations in which the claimant diligently sought judicial review by filing an effective pleading during the statutory period, as well as in cases in which the complainant had been induced by his adversary to filing after a deadline had passed.

The set of facts in this case prove that **Huerta**, through counsel's due diligence to file a timely pleading, was exercised. A complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would have established the timeliness of the claim. See **Conley v. Gibson**, 355 U.S. 41, 78

S.Ct. 99 (1957). See also **Super Mail Cargo, Inc. v. United States**, 68 F.3d 1204 (N.D.Cal. 1996). This is not a case of erroneous advice from counsel where equitable tolling might apply. See **Gilbert v. Secretary of Health and Human Services**, 51 F.3d 254 (D.C. Cir. 1995).

In **Huerta**'s case, this is a circumstance where the attorney applied due diligence and the proper known procedure, however, was misinformed and retroactively notified by the court of the untimely filing only after a decision was rendered. Equitable tolling is an appropriate remedy where certain criteria exists and courts regularly consider five (5) factors when determining whether to invoke the doctrine. The District Court and Court of Appeals did not apply this principle in violation of case law precedent.

(1) Lack of **actual** notice of filing requirement: Appellant lacked complete notice of any filing requirement different from what was done in filing the motion before the one-year date of the passage of the AEDPA through adequate postage in the United States Mail;

(2) Lack of **constructive** notice of filing requirement: there was no notice in the district court rules suggesting that the manner and means in which the case was filed was incorrect;

(3) **Diligence** in pursuing one's rights: all due diligence was initiated, including a telephone call to the clerk's office to ensure that counsel did not have to mail the document overnight;

(4) **Absence of prejudice** to defendant: since the prejudice is obvious in the deprivation of both the Sixth Amendment and a Tenth Amendment right, equitable tolling applies; and

(5) **Reasonableness** of plaintiff's ignorance of the notice requirement: it is reasonable to believe that neither counsel, and particularly the defendant, would have known that the filing requirements were different than what was investigated/advised. See **Andrews v. Orr**, 851 F.2d 146 (6th Cir. 1988). Even excusable ignorance is a factor where equitable tolling would allow for timely filing. See **Parkins v. Brown, Secretary, Dept. of Veteran Affairs, Veterans Admin.**, Civil No. 94-357-JD (1995), U.S. District Court 7287, decided May 26, 1995.

Huerta should have been afforded the protection of equitable tolling and lack of proper notice to any other form of filing other than what was perfected. The District Court did not consider this question as applied to first habeas petitions. *See* **Lonchar v. Thomas**, 517 U.S. 314 (1996).

(e) Due process conflicts are denied if a Petitioner cannot file a first habeas petition due to procedural error outside their control.

Huerta's due process rights are violated by not being allowed to litigate a matter in which Petitioner's Fifth and Sixth Amendment rights were violated.

The Fifth Circuit Court of Appeals relied on **Sonnier v. Johnson**, 161 F.3d 941 (5th Cir. 1998), in denying relief to **Huerta** based on untimely filing of his first habeas petition. Such premise, as relied upon in **Sonnier**, is in conflict with constitutional claims of Petitioner, the law and questions of innocence for which the Petitioner is entitled to habeas corpus consideration. *Sonnier* does not address counsel caused procedural default, equitable tolling or detrimental reliance for such circumstances. There is no Supreme Court precedent clarifying this problem or giving guidance to the lower courts to protect first habeas Petitioners from such conflicts. Petitioner had no control over these conditions, should not be penalized by not having his underlying claims reviewed. If the underlying habeas/substantive claims themselves are not constitutionally meritorious, that is a different question. To deny Petitioner access to the courts,

via habeas corpus, for procedural default, considering the time limitations of such motions, is to deny him a constitutional right to habeas corpus relief at all, or meaningful access to the courts in a critical stage of his criminal case. **Bounds v. Smith**, 430 U.S. 817, 52 L.Ed.2d 72, 97 S.Ct. 1491 (1977). *See* **Lonchar v. Thomas**, 517 U.S. 314 (1996).

This Honorable Court must decide a more equitable solution to the extent that a federal habeas Petitioner not be deprived of a constitutional right to access the courts, or to have a first habeas corpus petition heard on the merits. The AEDPA did not protect defendants from counsel's detrimental reliance on a set of circumstances that resulted in procedural default of his first habeas.

The Petitioner has made claims of actual innocence in relationship to his first habeas corpus petition and, therefore, should not be deprived of the right to proceed accordingly. See **Bounds v. Smith**, 430 U.S. 817,(1977). See **Murphy v. Johnson**, 110 F.3d at 11; **Whitehead v. Johnson**, 157 F.3d 384, 387-88; and **Sonnier v. Johnson**, 161 F.3d at 945. **Huerta** presents that the first step of the Fifth Circuit's **Murphy** test was to demonstrate a credible showing of procedural error outside Petitioner's control. The

second step is making a substantial showing of a denial of a constitutional claim in the underlying claims of the habeas petition. Petitioner asserts that he met the Fifth Circuit's **Murphy** test, however was denied the right to proceed denying him access to the court, violating his constitution rights to first habeas review.

Huerta claims that there were circumstances outside of his control which caused procedural default in failing to timely file his first habeas (2255) petition. He should not be deprived of his right of habeas review due to counsel's procedural error. **Huerta** further claims that retained counsel who fails to make a timely filing cannot be the cause of the Petitioner's deprivation of right established by the Constitution, since procedural default acts as a suspension of the "Great Writ" in violation of the Suspension Clause of the Tenth Amendment, which deprives him of important liberty interests.

While there is no exhaustive list of circumstances to justify a finding of cause, the Supreme Court has made clear that such a finding turns on whether the petitioner can show some objective factor external to the defense impeded counsel's efforts to comply with the procedural rule. See **Murray v. Carrier**, 477 U.S. 478 (1986). All of these cases were before the AEDPA

and the one year time limitation established by same. As such, reconsideration/review of these pre-AEDPA cases should be considered.

This Honorable Court must decide if a habeas corpus petition can be denied due to real or perceived procedural error, or detrimental reliance of an attorney outside the control of the Petitioner in violation of his 5th, 6th and 10th Amendment rights. Petitioner is not, per se, entitled to counsel in habeas representation. However, if a Petitioner retains counsel, they do not, in turn, give up their right to effective assistance of counsel for procedural matters.

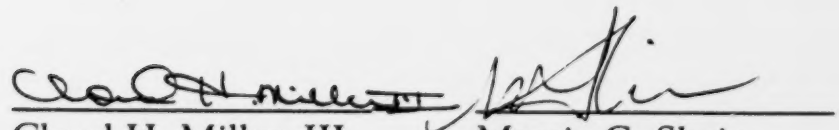
CONCLUSION

Huerta has a liberty interest in having his first habeas presented, on the substantive issues, without having to be punished for procedural defaults outside of his control. **Huerta**'s attorney developed and timely mailed a §2255 Motion which failed to be time date stamped by the clerk prior to the expiration of the one year statute of limitations. The "late filing" was outside the control of Petitioner. Petitioner further asserts that if other impediments to the timely filing of a §2255 could have occurred which would have created a late filing, to no fault of his, such should

not prohibit the court's consideration of the pleadings on the merits.

We proposition that there needs to be a means for equitable tolling to ensure that justice is protected when it comes to a first Writ of Habeas Corpus. *Cf.* **Lonchar v. Thomas**, 517 U.S. 314, 324 (1996); **Zipes v. Trans World Airlines, Inc.**, 455 U.S. 385 (1982) and **Holmberg v. Armbrecht**, 327 U.S. 392 (1946) (Unless Congress states otherwise, equitable tolling should be read into every federal statute of limitations).

This Honorable Court must also decide that if an attorney has procedurally erred, in good faith, to the detriment of the habeas petitioner, that equitable tolling should be applied. Based on the facts and case law presented, it is urged that this case be remanded to the District Court for consideration of the substantive issues of Petitioner's first habeas.



Cloud H. Miller, III
Attorney for Petitioner

Marcia G. Shein
Of Counsel

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
NOV 7 1997
U.S. DISTRICT COURT
CLERK'S OFFICE
By: /s/ Deputy

HERIBERTO HUERTA,	§	
	§	
Movant,	§	CIVIL ACTION NO.
	§	SA-97-CA-0539
v.	§	
	§	CRIMINAL ACTION NO.
UNITED STATES OF AMERICA,	§	SA-93-CR-136(1)
	§	
	§	
Respondent.	§	

MEMORANDUM AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: **Honorable Edward C. Prado**
United States District Judge

Pursuant to an informal referral of the above-styled and numbered cause to the undersigned United States Magistrate on April 25, 1997, and consistent with the authority vested in the United States Magistrates under the provisions of Title 28 U.S.C. §636(b)(1)(B) and Rule 1(d) and (e) of the Local Rules for the Assignment of Duties to United States Magistrates, Appendix C to the Local Rules for the Western District of Texas, effective January 1, 1994, the following report is submitted for your review and consideration.

I. Jurisdiction

Jurisdiction is noted pursuant to Title 28 U.S.C. §2255.

II. Statement of the Case

Factual Background

On May 7, 1993, the movant Heriberto Huerta and 23 co-defendants were named in a 38 count drug-related Indictment.[1] A Superseding Indictment was filed on November 19, 1993, naming the movant and his 23 co-defendants in an additional 41 drug-related counts.[2] Both Indictments related to the Texas Mexican Mafia prison gang and alleged a variety of drug offenses, i.e., distribution of heroin and cocaine, murder, assault, possession of firearm and engaging in a continuing criminal enterprise. The movant was also charged with conducting and participating in the Conduct of a Racketeer Influenced and Corrupt Organization (RICO).

On May 5, 1993 and November 19, 1993 the United States Attorney filed a Notice of Enhanced Punishment as the result of the amount of drugs involved. The movant was also subject to enhanced punishment because of a prior felony drug conviction.[3]

On February 23, 1994, after a lengthy jury trial, the movant was found guilty of the RICO count, conspiracy to conduct and participate in a RICO, possession with intent to distribute heroin, and aiding abetting the possession with intent to distribute heroin.[4]

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[1] Docket entry no. 3.

[2] Docket entry no. 1018.

[3] Docket entry no. 5 and 1020.

[4] Docket entry no. 1230.

The District Court sentenced the movant on May 26, 1994, to life imprisonment on each of four counts, 360 months on each of four other counts to be served concurrently with each other and consecutive to a prior federal prison sentence. The term of imprisonment was to be followed by a ten year period of supervised release, $2,500.00 fine, and to pay a mandatory special assessment of $350.00.[5]

On May 26, 1994, the movant filed a Notice of Appeal[6] in which he argued:

1) The Trial Court's findings that the Government's exercise of seven peremptory strikes on Hispanic Venire persons was based upon "Race Neutral" explanations, are clearly erroneous resulting in a violation of **Batson v. Kentucky**.

2) The use of seven peremptory strikes against venire persons by the Government resulted in a racially discriminatory purpose in violation of the Equal Protection Clause.

3) The use of a peremptory strike upon Hispanic venire person who had the loss of use of one arm violated the Equal Protection Clause and the Americans with Disabilities Act of 1990.

4) The District Court abused it discretion when an anonymous jury was empaneled.

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[5] Docket entry no. 1395 and 1443.

[6] Docket entry no. 1397.

5) The District Court erred when it overruled appellant's motion to suppress the wiretap because the interceptions were not made in compliance with the Order of Authorization.

6) The prejudicial effect of the admission of evidence of the murder of Teco Rangel outweighs its probative value in violation of Rules 403 and 404(b), FRCP.

7) The prejudicial effect of the admission of evidence of the murder of Chepo Hernandez outweighed its probative value in violation of Rules 403 and 404(b), FRCP.

8) The prejudicial effect of the admission of evidence of the murder of Frank Canales outweighed its probative value in violation of Rules 403 and 404(b), FRCP.

9) The prejudicial effect of the admission of evidence of the murder of Ty Morales outweighed its probative value in violation of Rules 403 and 404(b), FRCP.

10) Appellant Huerta objects to an incorrect application of the sentencing guidelines when consideration of uncharged conduct was incorporated into the computation of the base offense level.

The Fifth Circuit, in a comprehensive analysis of the case, rejected each of the movant's claims of error. In reaching this result, the Court of Appeals stated the "...evidence adduced at trial was overwhelming..." Accordingly, the

Fifth Circuit affirmed the movant's conviction and sentence.[7]

Procedural History

As stated earlier in this memorandum the movant's conviction was affirmed by the Fifth Circuit Court of Appeals on October 6, 1995. Thereafter, Congress enacted the Anti-Terrorism & Effective Death Penalty Act (AEDPA), establishing a one-year limitations period for the filing of a motion to vacate sentence under Title 28 U.S.C. §2255. The AEDPA became effective April 24, 1996. On April 25, 1997, movant filed his motion to vacate, set aside or correct his sentence pursuant to Title 28 U.S.C. §2255. In that motion the movant asserts three claims of error. They are:

1) Movant was sentenced to three life terms of imprisonment concurrent with each other and four thirty year sentences concurrent with each other and the life sentences, in violation of the double jeopardy clause, where the predicate offenses were lesser offenses of the RICO substantive offense.

2) Movant was tried and convicted upon evidence that in part was tainted by illegal and unconstitutional behavior of law enforcement authorities, in violation of Huerta's right to due process.

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[7] United States v. Krout, et al, 66 F.3d 1420 (5th Cir. 1996) (this was a consolidated appeal involving the movant and six co-defendants).

3) Movant was denied effective assistance of counsel at trial and sentencing due to his attorney's failure to properly prepare and call witnesses that could mitigate the Government's case.[8]

On April 28, 1997, the undersigned Magistrate Judge directed movant's counsel to show cause why the motion should not be dismissed as untimely.[9]

Movant's counsel responded to the Order to Show Cause on July 15, 1997, arguing that the movant's §2255 was timely filed.[10] She based her conclusion on **United States v. Lopez**, 100 F.3d 113 (10th Cir. 1996), and that she was told by the Clerk of Court for the Western District of Texas that pleadings would be considered "timely filed" if post-marked by April 24, 1997.[11]

The government's reply to the movant's argument that the §2255 motion was timely filed is threefold. First, the **Lopez** decision cited by the movant does not support her proposition that the AEDPA is not applicable to any conviction that became final prior to April 24, 1996; second, there is no "mail box rule" in the Fifth Circuit; and

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[8] Docket entry no. 1570.

[9] Docket entry no. 1596.

[10] Docket entry no. 1600.

[11] Apparently, movant's counsel is seeking the benefit of a "mail box" rule. There is no such rule in the Fifth Circuit as applied to counsel. In the Fifth Circuit the filing of pleadings with the district clerk can only be accomplished by proof of physical delivery of the document. See **United States v. Doyle**, 854 F.2d 771 (5th Cir. 1988).

finally, advice received from the District Clerk's office cannot overrule a statutory time requirement.[12]

III. Analysis and Authorities

The timely filing requirement that a §2255 motion must meet under the recently enacted AEDPA was addressed in the Western District of Texas, San Antonio Division in **United States v. Falcon**.[13] The circumstances in the filing of the movant's §2255 motion and that discussed in **Falcon** are virtually identical -- same motion, i.e., 2255, same counsel, same filing date and similar offenses. In fact, Falcon's motion and the motion of movant herein arrived at the office of the Clerk of the Court in the same envelope.

United States Magistrate Judge Pri .omo, in a well-reasoned analysis of the one-year limitations period for the filing of a motion to vacate sentence under the AEDPA, concluded that a §2255 motion filed by **Falcon** on April 25, 1997 was two days late. Magistrate Judge Primomo reasoned that using the effective date of the AEDPA as the starting time for the one-year statute of limitations, **Falcon** was obligated to file his motion to vacate sentence on or before April 23, 1997. Accordingly, he recommended that **Falcon's** §2255 motion be dismissed as untimely filed. The District Court accepted Magistrate Primomo's

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[12] See **Neely v. Murchison**, 815 F.2d 345 (5th Cir. 1987); See **Sonicraft, Inc. V. N.L.R.B.**, 814 F.2d 385 (7th Cir. 1987) (staff attorney for the Court allegedly told attorney that "mail box" rule would apply to the filing of a petition; petition mailed but not filed with the required time period; petition dismissed; Court notes that neither a staff attorney nor the Court can waive the time period for timely filing, which is jurisdictional).

[13] Order and Judgment filed July 15, 1997, dismissing **Falcon's** §2255 motion as untimely filed. Cause no. SA-97-CA-0538.

Memorandum and Recommendation and dismissed **Falcon's** §2255 motion as untimely filed.

The undersigned can add nothing to Magistrate Judge Primomo's excellent summary of the applicable law. He addressed and rejected each argument that counsel made suggesting that the §2255 motion was timely filed. As stated earlier, the same counsel represented both **Falcon** and the movant. The same arguments were made in each §2255 motion. The undersigned adopts the reasoning and conclusion reached by Magistrate Judge Primomo in his Memorandum and Recommendation on **Falcon's** §2255 motion. See attached Memorandum and Recommendation.

Recommendation

It is, therefore, the recommendation of the undersigned Magistrate Judge that the movant's §2255 motion be **DISMISSED** as untimely filed.

Instructions For Service and Notice of Right To Appeal/Object

The United States District Court shall serve a copy of this Memorandum and Recommendation on each and every party either (1) by certified mail, return receipt requested, or (2) by facsimile if authorization to do so is on file with the Clerk.

Under 28 U.S.C. §636(b)(1), and Rule 4(b) of the Local Rules for the Assignment of Duties to United States Magistrates (Appendix C to the Local Court Rules for the Western District of Texas), any party who desires to object to this report must file written objections to the Memorandum and Recommendation with the Clerk of this Court, and serve the Magistrate Judge and all parties,

within ten (10) days after being served with a copy of this Memorandum and Recommendation.[14] A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections.[15] A party's failure to file written objections to the proposed factual findings, legal conclusions, and recommendations contained in this report shall bar the party from a de novo determination by the District Court.[16] Additionally, any failure to file written objections to the proposed findings, conclusions, and recommendations contained in this report within ten (10) days after being served, shall bar the aggrieved party from appealing the factual findings and legal conclusions that are accepted or adopted by the District Court, except on grounds of plain error.[17]

SIGNED this 7 day of November, 1997.

/s/ Nancy Stein Nowak
NANCY STEIN NOWAK
United States Magistrate Judge

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[14] See **United States v. Wilson**, 864 F.2d 1219, 1221 (5th Cir. 1989), cert. denied, 492 U.S. 918 (1989).

[15] See **Battle v. U.S. Parole Commission**, 834 F.2d 419, 421 (5th Cir. 1987).

[16] See **Thomas v. Arn**, 474 U.S. 140, 150-55, 106 S.Ct. 466, 472-75, 88 L.Ed.2d 435 (1985); **United States v. Raddatz**, 447 U.S. 667, 673-76, 100 S.Ct. 2406, 2411-13, 65 L.Ed.2d 424 (1980); 28 U.S.C. §636(b)(1).

[17] See **Douglass v. United States Automobile Association**, 79 F.3d 1415 (5th Cir. 1996).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

HERIBERTO "HERBERT" HUERTA,

Movant/Petitioner,

vs.

CIVIL NO. SA-97-CA-0539
D.C. NO. SA-93-CR-136-01

UNITED STATES OF AMERICA,

Plaintiff/Respondent.

_____/

OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

COMES NOW, Petitioner, by and through undersigned counsels, and makes the following Objections to the Magistrate's Report and Recommendation received by counsel's office on November 12, 1997 via facsimile from the Clerk's Office for the Western District of Texas, San Antonio Division.

The Magistrate stated that "the government's reply to our argument that the 2255 motion was timely filed is threefold...Second, there is no "mail box rule" in the Fifth Circuit..." Counsel states that the 2255 was filed with the United States District Court, Western District of Texas, San Antonio Division. Counsel is seeking the benefit of the "mail box rule" in the United States **District Court**, and not the Fifth Circuit as referred to by the government.

The Magistrate's reliance on the decision in **United States v. Falcon** is premature in that counsel has filed a *Supplement to Petitioner's Notice of Appeal, Or In The Alternative, Motion To Reopen Petitioner's 2255* based on newly discovered information that could reverse the decision in the *Falcon* case.

The following information is being presented as newly discovered information that has just come to light regarding the timeliness question of law argued in this case.

If one examines the application of 2255 under the AEDPA, Section 105, it clearly states:

> **"(d)(1) A one year period of limitation shall apply to an application for a writ of habeas corpus...**
>
> **...(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactive to cases on collateral review; ..."** (Emphasis added).

See **Lindh v. Murphy**, 96 F.3d 856, 866 (7th Cir. 1996) (en banc) *reversed in part*, __ S.Ct. __, 1997 WL 338568 (June 23, 1997).

The *Lindh* case is the seminal case which defined the AEDPA as retroactive. **The time limitation for filing, therefore, would be one year from the date the Act was made retroactive by the Supreme Court, which would be June, 1997** (AEDPA 105(d)(1)(C).

In *Lindh*, the Supreme Court ruled that the Certificate of Appealability was retroactive. Many courts decided this must mean the whole AEDPA took retroactive effect. If such is the case, then any habeas review is retroactive from the date the Supreme Court made such a determination which would be one year from June of 1997. Therefore, Petitioner's case was filed timely consistent with the law and Amendment 105 as defined by the Supreme Court as retroactive.

The Petitioner objects to the Magistrate's Report and Recommendation related to untimely filing based on the court's position that the habeas was not received by April 24, 1997.

The Petitioner believes that if the court construes an untimely filing of the petition for habeas corpus relief, it violates the Petitioner's Sixth Amendment right on a claim of ineffective assistance of counsel for failing to properly file the petition timely. It also denies the Petitioner his right to access to the courts, a due process constitutionally protected right.[1] The Petitioner cannot be deprived of his right to access to the courts based upon ineffective assistance of counsel which raises a constitutional question of law for which the Petitioner is entitled to. If counsel was

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[1] Section (4) - The date on which the facts supporting the claim could have been discovered through the exercise of due diligence. (Due diligence was performed without knowing that the courts would reject the habeas claim, thus implicating that the one year term to avoid ineffective assistance of counsel, and a violation of a Defendant's Sixth Amendment rights, would be one year from the date in which the due diligence was applied and rejected. There was no way to discover the untimeliness question without filing said documents timely and the district courts throughout the country were confused about different forms of filing. The burden should not be on the Defendant to overcome what could not have been known despite the due diligence applied.)

ineffective in failing to properly perfect a filing of the 2255 document, then the Petitioner was being deprived of effective assistance of counsel, and thus was not given access to the Federal Courts of which he is entitled under the Constitutional laws of the United States.

The Petitioner objects to the Magistrate's Report and Recommendation in that it would act as a suspension of habeas corpus relief, based on ineffective assistance of counsel, in violation of the Suspension Clause of the Tenth Amendment to the United States Constitution, prohibiting suspension of habeas corpus relief except in times of civil unrest.

The Petitioner is held to an undeterminable standard with the enactment of the AEDPA and this court's restrictive and incorrect limits on filing Petitioner's 2255 after the AEDPA was passed by Congress.

On April 22, 1997, counsel, following due diligence, called every district court clerk's office, in which she still had petitions to file, to inquire into whether or not their particular court was going by the date of mailing as the filing date, or whether the documents had to be **received** in the clerk's office by the April 24th date so that she could overnight the petitions to the respective courts to ensure timely filing, if necessary. Counsel was informed by the district court clerk's office in San Antonio, Texas, that the **date of mailing** would be adequate for filing petitioner's habeas corpus petition, therefore, counsel did not overnight said petition. Additionally, in the courts that advised counsel that the documents would have to be **received** in the clerk's office by April 24th to be considered timely filed, counsel properly mailed same by overnight night (See **EXHIBIT A**), or faxed the petitions to other attorneys in the district court locations for hand delivery and filing with the

courts (e.g., **Lomelli v. United States**, Northern District of Illinois, Case No. 97-CV-02887-CRN, faxed to Attorney Steve Popuch, Chicago, Illinois, and hand delivered to the court for timely filing; **Hedgewood v. United States**, Southern District of Iowa, Case No. CR-93-11; **Bailey v. United States**, same case as above; **Johnson v. United States**, same case as above, Case No. 4:97-CV-70297; and **Falls v. United States**, same case as above, Case No. 4:97-CV-70295, all four (4) petitions faxed to Attorney Ron Wheeler, Des Moines, Iowa, who copied and hand delivered petitions to the Clerk's Office for timely filing). Had counsel been advised that the filing date would be the actual date of receipt, and not the mailing date, counsel would have overnighted petitioner's documents for proper and timely filing. Therefore, counsel made a good faith and diligent effort to make sure that all 2255, 2241 and 2254 petitions were timely filed as instructed by the Clerk's offices as to filing dates, including the case before this court, as well as **United States v. Falcon**. Counsel believed, in good faith, that by contacting the Clerk's offices of the various courts that she would be properly and truthfully advised as to the rule in that particular circuit court that would apply in each case.[2] Counsel was unaware

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[2] The Ninth Circuit recently concluded that "the discovery-interrogatory procedure of Rules 26 and 33 is not available in habeas corpus proceedings." **On the other hand, those rules dealing with...and computation of time (Rule 6), to the extent that they are relevant, may be appropriately applied. To a considerable extent the practice probably varies from circuit to circuit and is largely unreported. To that extent guidance must be sought from the clerk of court. In fact, it is *always* a wise precaution to check with the clerk of court if any question arises. The clerk of court is usually an invaluable source of information. *His knowledge of the Federal Rules is usually far superior to that of most lawyers.* In addition, there are many minor matters of procedure about which the rules are frequently silent. When such matters crop up...the answers should**

that she could not rely on the information received from the Clerk's office. Even the courts were unfamiliar with what would constitute timely filing as no new local rule was evidenced concerning same. Therefore, if the court's and the clerk's are confused about issues of timely filing, and attorneys act on that information, the Petitioner cannot be penalized when the court, without notice, decides arbitrarily, that such filing is not timely, again denying the Petitioner due process rights under the Fifth and Sixth Amendments, and effective assistance of counsel.

Courts cannot keep punishing Defendants when they, and their lawyers, work diligently to comply with laws that are unclear, where the courts themselves have to determine the retroactivity issues or filing requirements, and provide no notice of restriction to counsel.

MEMORANDUM OF LAW

Access to the court system is a fundamental constitutional right preserved under United States Constitutional Amendment No. 14. See **Bounds v. Smith**, 430 U.S. 817, 52 L.Ed.2d 72, 97 S.Ct. 1491, Defendant can assert there is an "actual injury" for being denied access to the court through a constitutional deprivation under the Fifth or Sixth Amendment, including ineffective assistance of counsel for allegedly failing to timely file a document. The principle function of habeas corpus relief is to ensure that "no man has been incarcerated under a procedure which creates an impermissibly large risk that an innocent man will be convicted".

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be sought from the clerk. [*Federal Habeas Corpus, A Second and Revised Edition of A Handbook of Federal Habeas Corpus*, Ronald P. Sokol, 1969, pg 145).

The AEDPA imposes a new rule of law on the Federal Government and on individuals who have access to federal courts. By imposing a new rule of law, determination of whether or not retroactivity should apply is one that must be narrowly construed. The new rule of law in the AEDPA announced a new standard for habeas corpus relief which was not in effect at the time of the Petitioner's conviction. See generally, **Trusdale v. Aiken**, 480 U.S. 527, 528-529 (1987). It was Justice Harlan's view that new constitutional rules of criminal procedure generally should not be applied retroactively to cases on collateral review to those cases who had become final before the new rules were announced. See **Teague v. Lane**, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), citing **Mackey v. United States**, 401 U.S. 667, 692.

This same principle would apply to the application of any new rules of procedure by a local court that are not defined in the local rules themselves.

Pursuant to Rule 6 of the Federal Rules of Criminal Procedure, the court may exercise its discretion to accept motions, or papers, filed outside the established time period where such failure was a result of excusable neglect. Based upon the good faith initiative that counsel took for filing Petitioner's 2255, and the suggestion that same was untimely, the Petitioner believes that excusable neglect applies. Due diligence was applied in filing the motion in a timely manner.[3]

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[3] Counsel does not believe an untimely filing occurred, however, if construed as such would implicate AEDPA §105(d). The one year period runs from the latest of the date on which the facts underlying the prisoner's claim or claims can be discovered "through the exercise of due diligence."

There is no local rule suggesting that mailing the document with adequate postage would not be sufficient and, counsel has shown, through the attached exhibit, that reasonableness and/or excusable neglect would dictate to avoid a miscarriage of justice to the Petitioner. Not only does excusable neglect relate to ineffective assistance of counsel, but to the due diligence that was applied in trying to perfect the document in a timely manner. Therefore, the court is urged to reconsider based upon excusable neglect, and the other factors as presented herein. See **Blair v. Beech Aircraft Corporation**, 104 FRD 21 (W.D.Pa. 1984). In *Blair*, the Petitioner's response was only one business day late. According to the argument of counsel, it was counsel's inadvertent miscalculation of the response date. In light of the hardship which could enure to the Defendants, the court would grant the Motion for Reconsideration and address the Defendant's motion on the merits. See also **Wagner v. Frazier**, 712 S.W.2d 109 (Tenn., 1986). Additionally, the default was not wilful and resulted from a mistake, inadvertent at best, and unexpected based upon the totality of the circumstances. Such considerations, as has been presented herein, comply with Rule 60(b) of the Federal Rules of Civil Procedure.

If the court construes counsel's conduct as procedural default, then same is cognizable for excusable neglect, and the court should allow the case to proceed as a result of ineffective assistance of counsel to avoid a miscarriage of justice and deprivation of the Fifth and Sixth Amendment rights of the Petitioner. See **Rosenwald v. United States**, 898 F.2d 585 (7th Cir. 1990), where ineffective assistance of counsel constitutes cause for procedural default consisting of failure to take a direct appeal and raise the 2255 claim then. This same principle applies for counsel's failure to timely file a 2255.

A 2255 proceeding is a critical stage of judicial process. Courts have uniformly found constitutional error without any showing of prejudice when counsel is either totally absent or prevented from assisting the accused during such critical stage of judicial proceedings. See e.g., **Geders v. United States**, 425 U.S. 80 (1976), **Brooks v. Tennessee**, 406 U.S. 605, 612-613 (1972).

WHEREFORE, the Petitioner requests this Honorable Court not follow the Report and Recommendation and decide the merits of the Petitioner's case to avoid a miscarriage of justice and an undue burden on the Petitioner. However, based on the rules of the AEDPA, the date *Lindh* was decided, and the "mail box rule" allowing three (3) days for mailing, Petitioner's claim may be construed as timely filed and reconsideration of the merits of his case should be considered.

/s/ M.Shein
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404-633-3797

/s/ Cloud H. Miller, III
Cloud H. Miller, III
GA Bar No. 506508
52 Exec. Park South
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Atlanta, GA 30329
404-633-3797

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this dated mailed a copy of the foregoing to AUSA Pamela A. Mathy, and AUSA Mike McCrum, United States Attorney's Office, 601 N.W. Loop 410, Suite 600, San Antonio, Texas 78216, by affixing sufficient postage thereon and depositing same in the United States Postal Service to ensure its delivery, and the original and three (3) copies has been mailed, via Federal Express, this date to ensure timely delivery of said document in the District Clerk's Office on Monday, November 24, 1997 based on the fact that the actual date of filing would have been November 22, 1997, however, since this date falls on a Saturday, Terry Rodriguez of the Clerk's Office stated this response would be timely filed if received in the Clerk's Office on Monday, November 24, 1997.

DATED: November 21, 1997.

Respectfully submitted,
/s/ M.Shein
Marcia G. Shein
Attorney at Law
Law Office of Marcia G. Shein, P.C.
52 Executive Park South, Suite 5203
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(404) 633-3797
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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
MAR 16 1998
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
By /s/
DEPUTY CLERK

HERIBERTO "HERBERT" HUERTA,	)	
	)	
Movant,	)	
	)	
v.	)	Civil Action No.
	)	SA93CR136(1)
UNITED STATES OF AMERICA,	)	SA97CA539
	)	
Respondent.	)	

ORDER

On this date the Court considered the Memorandum and Recommendation of the United States Magistrate Judge, filed in the above-styled and numbered cause on November 7, 1997, and the Plaintiff's Objections to Findings, filed November 24, 1997.

Standards

Where no party has objected to the Magistrate Judge's Memorandum and Recommendation, the Court need not conduct a de novo review of them. See 28 U.S.C. §636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). In such cases, the Court need only review the Memorandum and Recommendation and determine whether they are either clearly erroneous or contrary to law. **United States v. Wilson**, 864 F.2d 1219, 1221 (5th Cir.), cert. denied, 492 U.S. 918, 109 S.Ct. 3243, 106 L.Ed.2d 590 (1989). On the other hand, any Memorandum or

Recommendation that is objected to requires de novo review by the Court. Such a review means that the Court will examine the entire record, and will make an independent assessment of the law. The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or general in nature. **Battle v. United States Parole Commission**, 834 F.2d 419, 421 (5th Cir. 1987). In this case, the Court has reviewed the objections to the Magistrate Judge's Memorandum and Recommendation, finds them without merit, and therefore will accept the Memorandum and Recommendation.

Analysis

On May 7, 1993, the movant and 23 co-defendants were named in a 38-count drug-related Indictment. After a lengthy trial, the Movant was found guilty on a number of counts, and was sentenced to life imprisonment on four counts of the indictment and 360 months on each of four other counts. On April 25, 1997, the Movant filed his motion to vacate pursuant to 28 U.S.C. §2255. On April 28, 1997, the Magistrate Judge ordered the movant to show cause why the motion should not be dismissed as untimely because of the operation of the Anti-Terrorism & Effective Death Penalty Act (AEDPA). After hearing the Movant's response, the Magistrate Judge recommended that the present suit be dismissed, citing **United States v. Falcon**, SA-97-CA-0538 (W.D. Tex. July 15, 1997) (attached).

The Movant has filed objections similar (but not identical) to those filed in the Falcon case. The Court has thoroughly analyzed the movant's submission in light of the entire record. As required by 28 U.S.C. §636(b)(1)(c), the Court has conducted a de novo review with respect to those matters raised by the objections. After due consideration,

the Court concludes the Movant's objections lack merit for much the same reason as was discussed in Falcon.

As all objections have been overruled, it is hereby ORDERED that the Memorandum and Recommendation of the United States Magistrate Judge filed in this cause on November 7, 1997, be and is ACCEPTED pursuant to 28 U.S.C. Section 636(b)(1) such that the Movant's suit is DISMISSED.

SIGNED and ENTERED this 13th of March 1998.

/s/
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
MAR 16 1998
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
By: /s/
DEPUTY CLERK

HERIBERTO "HERBERT" HUERTA,	)	
	)	
Movant,	)	
	)	
v.	)	Civil Action No.
	)	SA93CR136(1)
UNITED STATES OF AMERICA,	)	SA97CA539
	)	
Respondent.	)	

JUDGMENT

On this date the Court considered the Judgment to be entered in the above-styled and numbered cause. Consistent with the Order filed in this cause on this same date.

It is hereby ORDERED, ADJUDGED and DECREED that the Memorandum and Recommendation of the United States Magistrate Judge filed in this cause on November 7, 1997, be and is ACCEPTED pursuant to 28 U.S.C. Section 636(b)(1) such that the Plaintiff's suit is DISMISSED.

SIGNED and ENTERED this 13th of March 1998.

/s/
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

HERIBERTO "HERBERT" HUERTA,

Movant/Petitioner,

vs.

CIVIL NO. SA-97-CA-0539
D.C. NO. SA-93-CR-136-01

UNITED STATES OF AMERICA,

Plaintiff/Respondent.

_____/

NOTICE OF APPEAL

Notice is hereby given that **HERIBERTO HUERTA**, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order denying petitioner's 2255 entered March 13, 1998, by the United States District Court, Western District of Texas, San Antonio Division, however not filed with the District Court Clerk's office until March 16, 1998. Applying the ten (10) day rule for filing a Notice of Appeal from the date the order was filed with the court would make the due date March 26, 1998.

The $105 filing fee is being sent with this timely Notice of Appeal. A Certificate of Appealability will be forwarded within ten (10) days.

Respectfully submitted,
/s/ M. Shein
Marcia G. Shein, Esquire
Law Office of Marcia G. Shein, P.C.
52 Executive Park South, Suite 5203
Atlanta, GA 30329

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this dated mailed a copy of the foregoing to AUSA Pamela A. Mathy, and AUSA Mike McCrum, United States Attorney's Office, 601 N.W. Loop 410, Suite 600, San Antonio, Texas 78216, by affixing sufficient postage thereon and depositing same in the United States Postal Service to ensure its delivery, and the original and three (3) copies has been mailed, via Federal Express, this date to ensure timely delivery of said document in the District Clerk's Office on Wednesday, March 25, 1998.

DATED: March 24, 1998.

Respectfully submitted,

/s/ M.Shein

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

vs.

CASE NO.: 98-50301
CIVIL NO.: SA-97-CA-0537
D.C. NO. SA-93-CR-136-(19)

HERIBERTO HERBERT HUERTA,

Defendant - Appellant.

CORRECTED APPLICATION FOR CERTIFICATE OF APPEALABILITY AND SUPPORTING MEMORANDUM

COMES NOW, Appellant, **Heriberto "Herbert" Huerta**, by and through undersigned counsel, and files this Application for Certificate of Appealability. A Notice of Appeal has been timely filed.

Petitioner respectfully asks this Honorable Court to issue a Certificate of Appealability based upon the following issues to be presented on appeal:

Issue I — Whether Huerta Had One Year from the Effective Date of the Anti-Terrorism And Effective Death Penalty Act Of 1996 To File His Motion To Vacate, Set Aside Or Correct A Sentence.

Issue II — Whether or Not the One Year Time Limit on the Retroactive Application of the

AEDPA Begins in June, 1997 as a Result of *Lindh v. Murphy*[1] and Section 105(3) of the AEDPA.

Issue III — Whether the date of mailing or the date of receipt by the district court constitutes the date of filing for statute of limitation purposes and pursuant to any application of the "mailbox rule".

Issue IV — Whether the habeas petition was timely filed based on equitable tolling and lack of notice which acts as a waiver, or bar, to any procedural default.

Issue V — Whether the habeas corpus petition itself could be denied based upon the violation of one constitutional right to effective assistance of counsel which acts as a deprivation of another constitutional right, as applied to the Fifth, Sixth, and Suspension Clause of the Tenth Amendment to the United States Constitution.

Issue VI — If the habeas petition is construed to have been untimely filed, does it result in a violation of the defendant's Sixth Amendment right to effective assistance of counsel, thus implicating Section 105(4) of the AEDPA allowing one year from the date of discovery of counsel's error in which to file a 2255 on direct habeas review.

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[1] 96 F.3d 856, 866 (7th Cir. 1996) (en banc), *rev'sd in part*, 117 S.Ct. 2059 (1997).

Issue VII — Pursuant to AEDPA Section 105(4), upon the Exercise of Due Diligence to Discover the Errors That Occurred by Defense Counsel, Appellant Was Entitled to Have One Year from the Discovery of That Concern to File His 2255.

Issue VIII — Huerta was sentenced to three life terms of imprisonment concurrent with each other and four thirty year sentences concurrent with each other the life sentences in violation of the double jeopardy clause, where the predicate offenses were lesser included offenses of the RICO substantive offense.

Issue IX — Huerta was tried and convicted upon evidence that was tainted in part by illegal and unconstitutional behavior of law enforcement authorities, in violation of Huerta's right to due process.

Issue X — Huerta was denied effective assistance of counsel at trial, and sentencing due to his attorney's failure to properly prepare and call witnesses that could mitigate the government's case.

WHEREFORE, given the prospective issues and the arguments supporting same, presented in the attached Memorandum, Huerta respectfully asks that this Honorable Court issue a Certificate of Appealability in his case.

MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR CERTIFICATE OF APPEALABILITY

STATEMENT OF FACTS

Heriberto "Herbert" Huerta and 23 co-defendants were named in a 38-Count Indictment returned by the Western District of Texas, San Antonio Division, grand jury on May 7, 1993. On November 19, 1993, a superseding indictment was filed naming 24 co-defendants and 41 counts. Counts One and Two charged 14 co-defendants with racketeering in relation to the Texas "Mexican Mafia" prison gang and alleged 11 racketeering acts involving possession with intent to deliver heroin and cocaine, possession of firearms, murder, and assault. The remaining counts charged different co-defendants with various offenses including continuing criminal enterprise, distribution of heroin and cocaine, possession of firearms, laundering of monetary instruments, disposition of a firearm to a person defendant has cause to believe is a felon, conspiracy to obstruct justice and to dispose of stolen firearms, aiding and abetting, carrying a firearm during a drug crime, and carrying a firearm during a murder. In addition, counts 40 and 41 direct that the defendants forfeit hundreds of thousands of dollars of criminally derived property to the United States. All offenses are alleged to have occurred between 1989 and the date of the indictment.

On May 7, 1993, the government filed a notice of enhanced penalties. It notified all defendants charged in Counts Four, Nine, Thirteen and Fourteen of enhanced penalties mandated as a result of certain drug amounts. On January 12, 1994, the Court grant the government's motion to dismiss the criminal forfeiture counts of the original

indictment and the superseding indictment. On January 13, 1994, the government filed an Enhancement Information. It notified **Huerta** that, as a person who had previously been convicted of a felony drug offense, he was subject to a penalty enhancement. Subsequently **Huerta** was charged in Count One, Conducting and Participating In The Conduct Of A Racketeer Influenced And Corrupt Organization, in violation of Title 18 U.S.C. § 1962(c); Count Two, Conspiracy To Conduct And Participate In The Conduct Of a RICO, in violation of Title 18 U.S.C. §1962(d); Count Four, Conspiracy To Distribute and Possess With Intent To Distribute Heroin, in violation of Title 21 U.S.C. § 846; and Counts Sixteen, through Nineteen, Aiding and Abetting The Possession With Intent To Distribute A Quantity Of Heroin, in violation of Title 21 U.S.C. § 841(a)(1) & 18 U.S.C. § 2. On February 23, 1994, **Huerta** was found guilty on Counts One, Two and Four, and Sixteen through Nineteen of the superseding indictment. **Huerta** was sentenced on May 26, 1994, to the custody of the Bureau of Prisons to a life term of imprisonment on each of Counts One, Two, and Four, and terms of thirty years imprisonment on each of Counts Sixteen through Nineteen to be served concurrently with each other, consecutive to a prior federal prison sentence. **Huerta** was assessed with a fine of $2,500.00 on Count Two of the indictment, and a special assessment of $50.00 on each count for an aggregate of $350.00.

An appeal was filed in **Huerta's** behalf, and addressed the following issues: (i) the district court was clearly erroneous in finding that the government's exercise of seven peremptory strikes, as to Hispanic Venire persons was based upon "race neutral" explanations; (ii) the use of the peremptory strikes resulted in a racially discriminatory purpose, in violation of the Equal Protection Clause; (iii) the use of a peremptory strike against a potential juror who-

had lost the use of one arm violated the Equal Protection Clause and the Americans with Disabilities Act of 1990; (iv) the district court abused its discretion when an anonymous jury was empaneled; (v) the district court erred by overruling Huerta's Motion To Suppress Wiretap Evidence because the interceptions were not made in compliance with the Order of Authorization; (vi) the district court erred by permitting the telephone conversations of Emily Mendoza into evidence, as Mendoza was not a co-conspirator; (vii) the prejudicial effect of the admission of evidence as to the murder of Teo Rangel outweighed the probative value; (viii) the prejudicial effect of the admission of evidence as to the murder of Chepo Hernandez outweighed its probative value; (ix) the prejudicial effect of the admission of evidence of the murder of Frank Canales outweighed its probative value; (x) the prejudicial effect of the admission of evidence relating to the attempted murder of Tye Morales outweighed its probative value; and (xi) there was an incorrect application of the Sentencing Guidelines through the incorporation of uncharged conduct into the computation of the base offense level.

The Fifth Circuit Court of Appeals affirmed **Huerta's** conviction on October 6, 1995. See ***United States v. Krout, et al.***, 66 F.3d 1420 (5th Cir. 1996).

Huerta, by and through, submitted a motion, pursuant to 28 U.S.C. §2255, to the court on April 23, 1997. However, said motion was not received in the district court clerk's office, and stamped "filed" until April 25, 1997. Given the date of the stamped "filing", along with the strictures of the AEDPA, the Magistrate Judge recommended that the §2255 motion be dismissed as being untimely.

After considering the Report and Recommendation, along with the objections filed thereto, the district court dismissed the §2255 motion on March 13, 1998. A Certificate of Appealability was filed in the district court and subsequently denied.

Huerta now seeks a Certificate of Appealability, as there exists a myriad of legal and constitutional questions that must be answered concerning the court's denial of Appellant's habeas motion on the basis of a retroactive effect of the AEDPA, as well as the substantive issues of the §2255 Motion.

ARGUMENT AND CITATIONS OF AUTHORITY

Issue I

WHETHER PETITIONER HAD ONE YEAR FROM THE EFFECTIVE DATE OF THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 TO FILE HIS MOTION TO VACATE, SET ASIDE OR CORRECT A SENTENCE.

Huerta retained counsel to file a habeas corpus petition pursuant to 28 U.S.C. 2255. Said petition was filed after April 24, 1996, however, before April 24, 1997. His conviction was final on July 19, 1995. Prior to April 24, 1996, anyone could file a habeas corpus petition at any time. However, the AEDPA attempted to dramatically change the restrictions applied to persons interested in filing habeas corpus proceedings. A retroactive effect, however, of such an ominous change in the law would have an ex post facto result, and therefore, be detrimental to those whose convictions became final prior to the passage of the Act but who chose to file the habeas petition after

the passage of the Act. Questions then arise as to whether or not a person is subject to retroactivity and what would be a reasonable period of time necessary, once the Act passed, to support such an application for a person whose conviction became final prior to the passage of the Act but who chose to file such a petition after the Act was implemented. These questions have been left unanswered, and the Act itself is not a model of clarity.

Huerta did file his habeas corpus proceeding subsequent to April 24, 1996 and before April 24, 1997. There is a question of whether or not the Act has retroactive effect, in whole or in part, as well as the question of whether or not it can reach back to those persons whose convictions became final in such a way as to restrict them from being allowed to proceed in pursuing habeas corpus relief. Any such restriction would act as a bar to and/or a suspension of a habeas corpus right in violation of the Suspension Clause of the Tenth Amendment.

The **Lindh v. Murphy** decision did not give retroactive effect to the entire Act, and nothing in the Act applied retroactively. Thus, a closer examination of this problem must be initiated.

Furthermore, **Huerta's** rights are violated by not being allowed to litigate a matter in which his constitutional rights were violated at the time in which her sentence was imposed.

An examination of the questions of law concerning the AEDPA and its affect on **Huerta** is appropriate for this court to consider.

a. ***Landgraf*** Effect On Retroactivity Of A New Statute.

Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), provides the framework for determining the initial question of whether the AEDPA applied to pending cases on its date of enactment. First, "where the congressional intent is clear, it governs"; if the statute evinces a clear intent for prospectivity or retroactivity, there is no need to analyze the issue further. *Id.*, 114 S.Ct. at 1496 (quoting **Kaiser Aluminum & Chem. Corp. v. Bonjorno**, 494 U.S. 827, 837, 110 S.Ct. 1570, 1577, 108 L.Ed.2d 842 (1990)). If congressional intent is ambiguous, however, then it must be determined whether the statute has "retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.*, 114 S.Ct. at 1505. If the statute would operate retroactively in this manner, then it does not apply to pending cases. If the new law does not have retroactive effect -- *i.e.*, it is a rule of procedure, or a jurisdictional statute changing the tribunal to hear the case, or a law altering the standard for granting purely prospective relief -- then the new statute does apply to pending cases. Reviewing the AEDPA under the first part of the ***Landgraf*** test, it is concluded that Congress did not intend §104 of the AEDPA to apply to actions pending on the date of its enactment, and thus, it is unnecessary to consider, under the second part of the ***Landgraf*** test, whether the law would have retroactive effect.

In drafting §107, Congress stated explicitly that the new death penalty chapter applies retroactively: "Chapter 154 of Title 28, United States Code ... shall apply to cases pending on or after the date of enactment of this Act."

AEDPA, §107(c). In contrast, the amendments to Chapter 153, including §104, lack any provision specifying whether they are prospective or retroactive. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." **Gozlon-Peretz v. United States**, 498 U.S. 395, 404, 111 S.Ct. 840, 847, 112 L.Ed.2d 919 (1991) (quoting **Russello v. United States**, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983)). Applying this maxim to the AEDPA, without specific retroactive language, applied to non-pending cases, retroactivity to all cases finalized before the Act, yet filed after the Act took effect, is not evidenced in the Act itself.

Landgraf states that "if the statute would operate retroactively, our tradition and presumption teaches that it is not governed absent clear congressional intent favoring such result". ***Id.*** at 280. Statutes will not be construed to have retroactive effect unless their language requires such result. ***Id.*** at 264. Requiring clear intent ensures that Congress itself has affirmatively considered the potential unfairness of retroactive application to any case pending or not, ***Id.*** at 272-273, finding no clear evidence of congressional intent to rebut the presumption against statutory retroactivity. ***Id.*** at 286.

Since ambiguity exists as to Section 105 and retroactive effect to non-pending finalized cases, the rule of lenity[2]

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[2] The question of lenity has been defined more specifically. See ***United States v. Bass***, 404 U.S. 336, 30 L.Ed.2d 488, 92 S.Ct. 515, *(ambiguity concerning the ambient of criminal statutes should be resolved in favor of lenity);* ***Lewis v. United States***, 401 U.S. 808, 812, 91 S.Ct. 1056 (1971), *(When choices have to be made between two readings of what conduct the Congress had made in crime, it is appropriate, before we choose a harsher*

might be an appropriate option to address relative to whether retroactivity applies to the degree necessary to imply that the AEDPA requires a one-year limitation on the time frame for which to file a habeas petition subsequent to the passage of the Act. Pre-Act pending petitions are not at issue in Petitioner's case.

b. AEDPA And Retroactivity From *Lindh v. Murphy*.

The seminal case dealing with the AEDPA and any retroactive effect is **Lindh v. Murphy**, 96 F.3d 856, 866 (7th Cir. 1996) (en banc), *reversed in part*, 117 S.Ct. 2059 (1997). ***Lindh*** addressed the retroactive application of a Certificate of Appealability to a case that was filed prior to the enactment of the Act. It did not address the implication of retroactivity to any case whose disposition became final before the Act but did not file a 2255 petition until after the Act was implemented. The Act itself created no time frame for filing a habeas petition once the Act was passed. It also created no retroactive language that reaches back to cases whose disposition had been completed years

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alternative, to require that Congress should have spoken in language that was clear and definite); ***United States v. Universal C.I.T. Credit Corp.***, 344 U.S. 218, 221-222, 73 S.Ct. 227 (1952) *(a fair wording should be given to the world on language the common world would understand of what the language intended to do if a certain line is passed. To make the wording fair so far as possible, the line should be clear....because of the seriousness of the criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures, not courts, should define criminal activity.)*

This policy embodies "*the instinctive distaste against men languishing in prison unless a lawmaker has clearly said they should.*' Where there is ambiguity in a criminal statute, or in a criminal penalty as is defined by the Federal Sentencing Guidelines that are formulated through statutes doubt should be resolved in favor of the defendant.

before the passage of the Act, but who had never filed a habeas petition and filed same after the Act. The Act also provided no time limit for old law cases to file a habeas petition.[3]

Even making the assumption that upon the passage of the Act, a one-year time limitation became a retroactive effect on anyone who had never filed previously, and who chose to file after the enactment of the Act, one would have to look at where, in the Act itself, does language exist limiting the appropriate scope of time for the "old law" (pre-Act cases) to be restricted to that time frame.[4] ***Lindh*** actually addressed only whether various features of the Act applied to cases that were already filed before the Act was passed. ***Lindh*** did not address the specificity of retroactivity to cases that had not been filed, but whose disposition became final prior to the enactment of the Act. Such

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[3] Generally, the courts have construed the one year time limit from the date in which the impediment to making a motion created by governmental action in violation of U.S. laws or constitution removed, if Movant was prevented from making a motion by such governmental action, Section 105(2), or the day in which the facts supporting the claim could have been discovered through the exercise of due diligence, Section 105(4). These are the only two provisions within the Act itself that might give rise to understanding when a person from the "old law" concepts of the habeas corpus relief would be required to file and thus there is an inference that the one year time frame for some courts was from the date of the Act to the following year anniversary date. There is no specific language, however, when the Act that suggests that this is an accurate reflection of old law cases' requirement for timely filing of habeas petitions when they had not yet filed one prior to the passage of the Act.

[4] The time limit is an arbitrary limitation without clear intent from Congress to apply to cases that had not been filed. See also **Wilkins v. Delo**, 91-0861, Western District of Missouri, May 15, 1996 (the court determined that given the explicit retroactivity language of 107, the lack of such language in 101-106 indicates Congress considered and rejected retroactive application of those sections).

specific language of retroactivity must be evidenced in order to affect all cases dispositioned and considered final prior to the enactment of the Act.[5]

The question then becomes "What case made the AEDPA, as it applies to habeas petitions for 2255 relief, retroactive?" The text of 2244(d)(1)(C) is ambiguous and an intrusive question on whether the filing period begins as soon as the Supreme Court recognizes the new right or, instead, when the Court determines that the new right is retroactively applicable. The occasion again calls for pragmatic judgment, sensitive to the text of this provision, the purpose it serves in connection with the basic filing period established by 2244(d)(1)(A) and the practical implications for litigation. (See Section 105(1) through (4), (a) through (d)). In this regard, the Act probably means only to start the clock when the Supreme Court itself renders a decision squarely holding a new right to be retroactively applicable to habeas cases. It would not do to measure the filing period from the date in which some state court, or a lower federal court, determines that a new principle is retroactively available in collateral proceedings. Litigants cannot track decisions in all of the courts, and courts in theory to the Supreme Court often disagree. A workable filing deadline demands greater clarity.

c. **Reasonable Time Considerations**.

Since the Act itself does not speak to retroactivity to pre-Act finalized convictions, the only thing that can be reviewed is what the courts have interpreted as a "reasonable" period of time in which to file a 2255, after the Act's passage.

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[5] Finality as it relates to the criminal case through the Petition for Certiorari or mandate on appeal without an application for certiorari.

Under the Supreme Court's decision in **Lindh v. Murphy**, supra, the one-year time limits in AEDPA §§ 101 and 105 cannot be applied to cases filed before April 24, 1996. Questions remain, however, regarding the effect of the one-year time limit on cases commenced *after* the date of enactment, where more than one year may have passed from the various "triggering" dates enumerated in §§ 2244(d)(1) and § 2255.

The courts of appeal agree that it would be unfairly retroactive to apply the statute of limitations to bar litigation of cases filed within a reasonable time after the date of enactment of the Act. **Peterson v. Demskie**, 107 F.3d 92, 93 (2d Cir. 1997); **Lindh v. Murphy**, 96 F.3d 856, 866 (7th Cir. 1996) (en banc), *reversed in part*, 117 S. Ct. 2059 (1997); **Calderon v. United States District Court (Beeler)**, 112 F.3d 386, 389 (9th Cir. 1997) (hereafter "*Beeler*"), *ptn. for rhrg. sugg. for rhg. en banc pending*; **United States v. Simmonds**, 111 F.3d 737, 746 (10th Cir. 1997). These cases rely on **Texaco Inc. v. Short**, 454 U.S. 516, 527 n.21 (1982), which holds that new statutes of limitation must allow "a reasonable time after they take effect for the commencement of suits upon existing causes of action." The courts of appeal have not, however, agreed as to what constitutes a "reasonable time." As such, litigants are left to second guess the various district court's expectations.

In ***Lindh***, the Seventh Circuit held the Act's one-year time limit[6] to be sufficiently short to constitute a "reasonable time" to comply, and the court allowed all habeas petitioners a full year after the effective date of the AEDPA to file their petitions in federal court, even if their

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[6] The Act itself has no one year limiting language to old law, pre-Act cases.

claims accrued years before the date of enactment. The Ninth and Tenth Circuits agree with this approach, see ***Beeler***, 112 F.3d at 389; ***Simmonds***, 111 F.3d at 746, as have various district courts, see **Kapral v. United States**, 1997 U.S. Dist. Lexis 11640, WL 447575 (D.N.J. 7/28/97); **Martin v. Jones**, 969 F.Supp. 1058 (M.D.Tenn. 1997); **United States v. Jones**, 963 F. Supp. 32 (D.D.C. 1997); **Duarte v. Hershberger**, 947 F. Supp. 146 (D.N.J. 1996); **Flowers v. Hanks**, 941 F. Supp. 765 (N.D.Ind. 1996).

Other courts have not been quite so generous. For example, in **Peterson v. Demskie**, the Second Circuit held:

> [W]here a state prisoner has had several years to contemplate bringing a federal habeas corpus petition, we see no reason to accord a full year after the effective date of the AEDPA. At the same time, we do not think that the alternative of a 'reasonable time' should be applied with undue rigor. In this case, the petition was filed 72 days after the effective date of the Act . . . We conclude that the filing was timely.

Peterson, 107 F.3d at 93. Courts using an analysis akin to that in ***Peterson*** have held petitions filed up to ten months after the AEDPA's date of enactment to be filed within a "reasonable time." See **Smith v. United States**, 945 F. Supp. 1439 (D.Col. 1996) (§2255 motion filed two months after date of enactment timely); **Ojeda v. Artuz**, 1997 WL 283398 (S.D.N.Y. 1997) (unpublished) (petition filed 89 days after date of enactment timely); **Scire v. United States**, 1997 WL 138991 (E.D.N.Y. 1997) (unpublished) (same); **Rivalta v. Artuz**, 1997 WL 401819 (S.D.N.Y. 7/16/97) (unpublished) (six months a "reasonable time"); **United States v. Ortiz**, 1997 WL 214934 (E.D.Pa. 1997) (unpublished) (§ 2255 motion filed within 10 months of

date of enactment timely). However, petitions filed immediately before the lapse of the one-year period following enactment have been dismissed as untimely under the Act. **Maddaloni v. Greiner**, 1997 WL 438801 (S.D.N.Y. 8/5/97) (unpublished) (petition filed April 7, 1997); **Rosa v. Senkowski**, 1997 WL 436484 (S.D.N.Y. 8/1/97) (unpublished) (petition filed April 8, 1997); **Oppenheimer v. Kelly**, 1997 WL 362216 (S.D.N.Y. 6/27/97) (unpublished) (petition filed April 9, 1997); **Kirby v. Senkowski**, 1997 WL 399663 (S.D.N.Y. 7/15/97) (unpublished) (petition filed April 15, 1997); **Lee v. Artuz**, __ F.Supp. __, 1997 WL 405329 (S.D.N.Y. 6/24/97) (petition filed April 18, 1997).

Still other courts have read the statute of limitations provisions strictly, allowing no grace period after the date of enactment. See **United States v. Smith**, 966 F. Supp. 408 (E.D.Va. 1997) (statute of limitations provisions applicable to §2255 motions "do not contain a grace period in which prisoners are given an additional time to file, and...took effect immediately upon enactment"; therefore, §2255 motion filed April 23, 1997 untimely); **Clarke v. United States**, 955 F. Supp. 593 (E.D.Va. 1997) (§2255 motion filed October 21, 1996 untimely: "If Congress had intended to delay the enforcement of its reforms, Congress easily could have provided a grace period in this portion of the AEDPA."); **Curtis v. Class**, 939 F. Supp. 703 (D.S.D. 1996) (petition filed July 11, 1996 untimely); **United States v. Bazemore**, 929 F. Supp. 1567 (S.D.Ga. 1996) (§2255 motion filed July 20, 1996 untimely). Such ambiguity and inconsistency cannot be advanced to the detriment of the litigant without violating their constitutional rights to access the courts, due process and habeas review under the provisions of the Suspension Clause of the Tenth Amendment.

d. When Does The Time To File Begin And End?

For section 2255 motions raising claims under a right "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," the statute of limitations begins to run on the date of the Supreme Court's decision. **United States v. Ortiz**, 1997 WL 214934 (E.D.Pa. 1997) (unpublished) (statute of limitations began to run on date of decision in **Bailey v. United States**, 116 S. Ct. 501 (1995)); **United States v. Adams**, 1996 WL 363926 (E.D.Pa. 1996) (unpublished) (same).

Thus, by implication, law and fact, any petitioner who files a habeas corpus petition after April 24, 1996 is not restricted by the April 24, 1997 one year time date, but a June, 1997 to June, 1998 time constraint in light of the reasonable time construction as to the implications of retroactivity as defined in ***Lindh***.

The problem here, then, is what is considered reasonable since all of the courts have determined this position differently. The affect of the term "reasonable time" also gives retroactive effect to something that had no retroactive application. Here, too, the *ex post facto* problem looms its ugly head on whether or not this type of limitation constitutes a detriment to persons whose cases have long since been decided prior to the enactment of the Act itself and thus acts as an impermissible penalty.[7] Any

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[7] An *ex post facto* law is a law that is passed after the occurrence of a fact or commission of an Act, which retrospectively changes the legal consequences or relations of such fact or deed. Such a law is the type which assumes to regulate civil rights and remedies, in effect, imposing a penalty, or a deprivation of a right which, when done, was lawful; along which deprives a person accused of a crime of some lawful protection to which they have become entitled; any law which, in relationship to the

impediment to being able to access the courts may itself be unconstitutional.[8]

A statute does not operate retrospectively merely because it is applied in a case arising from conduct antedating the statutes enactment or upsets the expectations based on prior law. **Lindh v. Murphy**, 96 F.3d 856, 863 (7th Cir. 1993), *en banc* (the possibility of an adverse effect is not the definition of retroactive effect). For the purposes of the ***Landgraf*** judicial default rules presumption, applying a statute to a pending case has retroactive effect only when doing so produces a genuinely retroactive effect and constitutes a truly retrospective application. ***Id***. at 114 S.Ct. at 1503-04. In other words, the ***Landgraf*** analysis, retroactive effect, is a term of legal art which does not describe all applications of a statute to pre-existing causes of action or pending proceedings. The definition of retroactive effect in this context is more narrow than that and conveys less of a description of premises than an announcement of a conclusion, and end of the analysis label. As the Supreme Court explained, "The conclusions that a particular rule operates retroactively comes at the end of a process of judgment concerning the nature and extent of the change in the law, and the degree of connection between the operation of the

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offense or its consequences, alters the situation to a person to their disadvantage.

[8] See **Bounds v. Smith**, 430 U.S. 817, 52 L.Ed.2d 72, 97 S.Ct. 1491, Defendant can assert there is an "actual injury" for being denied access to the court through a constitutional deprivation under the Fifth or Sixth Amendment, including ineffective assistance of counsel for allegedly failing to timely file a document. The principle function of habeas corpus relief is to ensure that "no man has been incarcerated under a procedure which creates an impermissibly large risk that an innocent man will be convicted".

new law, rule and relevant past event." ***Id.*** at 114 S.Ct. at 1499.

For cases dispositioned, and "finalized" prior to the enactment of the Act, but yet not filed, a petition for habeas corpus relief, under pre-Act law, assumes no end to the right to file such pleadings. The habeas right existing under the "old law" (pre-Act), allowed a defendant to file a petition for habeas corpus relief at any time subsequent to the finality of the appeal or the Petition for Certiorari and Supreme Court disposition, if applicable. Thus, that right continues until that right is exercised. This was the law at the time those cases were complete, and to change that law becomes an impermissible detriment (ex post facto) fraught with ambiguity and inconsistencies.

As a result of the reasonable time question being so varied, many defendants are deprived of their constitutional right to file a habeas corpus petition, a right that pre-existed the Act for those individuals who wished to file after the Act's passage, thus creating consequences that are inconsistent with the Act itself, the language of the Act, and the facts and law that applied to pre-Act defendants.

Since the term of art of "reasonable time" is so varied, it cannot be construed consistently, and thus lies as a detriment to such defendants as **Huerta**. ***Lindh*** talks about the retroactive effect of a Certificate of Appealability but does not give the total Act itself retroactive effect. Therefore, because **Huerta's** case is an "old law" case, under pre-existing 28 U.S.C. § 2255 rules and regulations, it is the contention of **Huerta** that he is not restricted to any term of "reasonable" time after the enactment of the Act for the purpose of filing his petition, and that the one-year time frame (or less) from April 24, 1996 in which to file a habeas petition is without a basis in law. Neither has

the Supreme Court ruled on any retroactive effect to the terminology of reasonable time clarifying the discord among the circuits which also is to the detriment of **Huerta**. If any retroactive effect is applied, it has to be from the date of the decision from the Supreme Court in ***Lindh***, thus giving **Huerta** one year to file his habeas petition beginning June 23, 1997 to June 23, 1998.

Huerta respectfully submits that the district court erred in finding that the original Habeas Petition was untimely. While the AEDPA, effective April 24, 1996, placed a one-year time limit for filing habeas motions from the time a case became final, several courts have awarded potential petitioners, already incarcerated when the AEDPA was passed, a "reasonable time" after the enactment date for which to successfully file habeas motions in the district courts. This "reasonable time" has been determined, for the most part, to extend one year from the enactment date of the AEDPA (i.e., April 24, 1997). As the present §2255 Motion was filed, via United States Mail, with the district court on April 23, 1997, it is submitted that said Motion was timely filed.

Issue II

WHETHER OR NOT THE ONE-YEAR TIME LIMIT ON THE RETROACTIVE APPLICATION OF THE AEDPA BEGINS IN JUNE OF 1997 AS A RESULT OF *LINDH VS. MURPHY* AND SECTION 105(3) OF THE AEDPA.

Many courts have used the decisions in ***Landgraf*** and ***Lindh*** as a coordinated analysis implying retroactive effect to the AEDPA as a whole. Though these cases do not specifically speak to that concern, even if we give total

retroactive effect to the AEDPA, we cannot give such retroactive effect until the *Lindh* case was decided. Such is the first seminal case defining any retroactive, or retrospective, effect of the AEDPA or portion thereof.

As stated in 2244(d)(1), the one-year period for filing a habeas corpus[9] runs from the latest of several events, one of which is §105(3):

> ***"The date in which the constitutional right asserted is initially recognized by the Supreme Court, if the right, has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or..."*** (emphasis supplied)

Subsection (3) specifically states that the one-year time frame begins from the date in which a right has been "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." If such is the position taken from ***Lindh***, then retroactive effect would be one year from the date of the decision made by the Supreme Court in that case. The date the Supreme Court decided ***Lindh*** was June 23, 1997. One year from that date would allow the filing of any habeas review one year after that date, or at least until June 23, 1998. This establishes consistency and clarity as to the term "reasonable time".

It must be clarified that ***Landgraf*** and ***Lindh*** were designed to define retroactive effect to a particular portion of the AEDPA. The expanded scope of such consideration is by different circuit court's interpretation of the Act itself.

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[9] Assuming the application of retroactivity.

There has even been a court that has denied relief to a State prisoner filing a Federal habeas corpus petition within the one year time frame of the enactment of the Act based on the fact that her filing of such claim was two and one-half years after her case became final in the State Court. See **Jeffrey Deskovic v. Louis Mann, Superintendent, Shawagunk Correctional Facility**, Case No. 97-CIV-3023(BSJ)(GAY) (S.D.N.Y. 1997).[10] Such deprivation of rights is to interpret the Act so narrowly that one can only believe that it would be impossible for Congress to pass the AEDPA without making clear language of its retroactive, or retrospective, effect on cases that have been finalized prior to the enactment of the Act, and leaving that to presumption, confusion and inconsistency, thus denying meaningful access to courts altogether. This type of decisionmaking also acts as a bar to habeas review, a supervision of a right impermissible under the Tenth Amendment to the United States Constitution. ***Landgraf*** decision specifically states that presumption of such is not proper. Passing the AEDPA, without an identification of any time constraints on persons who had yet to file who were subject to old law considerations, cannot be construed as an arbitrary number of days in which to file after the passage of the Act. The only reasonable and rational solution is to look to the case law, as decided by the

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[10] See also **United States v. St. Pe'**, Case No. 92-459 (E.D.La. May 1, 1997), denying ***Bailey*** relief based on filing habeas petition 1½ years after ***Bailey*** was decided by the Supreme Court and one year after the AEDPA. See **Bailey v. United States**, ___ U.S. ___, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). Additionally, there is no detriment to the government in relationship to not applying the AEDPA retroactively. There is a gate keeper provision under Rule 9(a) of the Federal Rules Governing 2255 Proceedings that allows the government, and the courts, to deny relief on habeas review for those who put the government at peril by waiting too long to seek habeas relief, resulting in lack of availability of witnesses and evidence.

Supreme Court, and determine what retroactive effect was given to the Act, and from that date, as described in the Act, take the one year term as a time frame in which retroactivity was decided. The Act is not retroactive, it does not speak to retroactivity, and it cannot be arbitrarily applied in different circuits and still remain consistent with the requirements of the law and the Constitution.

Therefore, the one year time period at best must begin from June, 1997 when the ***Lindh*** case was decided. **Huerta's** case was filed timely.

Huerta respectfully submits the fact that the AEDPA does not contain any language of retroactivity. Included in the AEDPA is an affirmation that supports the requirement that a one year time frame be granted to any factor influencing the outcome of a habeas petition after a date in which the Supreme Court declares the matter subject to retrospective application. As such, the contents of the AEDPA itself give guidance to when the AEDPA may be construed as retroactive if it is construed as retroactive at all. ***Lindh*** was the first case that directed attention to any portion of the AEDPA as retroactive. Therefore, the date of this decision implicates a one year time frame for filing habeas petitions. The decision in ***Lindh*** occurred in June, 1997. Therefore, all petitions would be considered timely filed until June, 1998.

Issue III

WHETHER THE DATE OF MAILING OR THE DATE OF RECEIPT BY THE DISTRICT COURT CONSTITUTES THE DATE OF FILING FOR STATUTE OF LIMITATION PURPOSES.

In **Huerta's** case, it is respectfully submitted that the date of mailing controls. **Huerta** filed his § 2255 petition by and through the United States Postal Service, with adequate postage, on April 23, 1997. In good faith, and through due diligence, Appellant's counsel called the district court clerk's office pertaining to **Huerta's** case, and the determination of how the district court handles filings via mail and what the date of filing is determined by (e.g., date of filing by postal service or date of delivery). The clerk's office, responding to the inquiry, verified that the date that would be used for purposes of determining the filing of the Federal habeas-corpus petition, would be the date that it was mailed in the United States Postal Service using adequate postage. Based on this phone call, and acting in good faith, counsel filed **Huerta's** motion through the postal service on April 23, 1997. There was no notice of any new rule that had taken effect in the district court concerning this information being incorrect. There was no information indicating that a local rule existed changing this interpretation. The presumption, therefore, exists that the proper filing of the petition for habeas corpus relief was evidenced through the exercise of due diligence. Detrimental reliance of the court's instructions cannot act as a bar to habeas relief.

Huerta is entitled to reasonably rely on the United States Postal Service when a document is timely entered into the system of mail supported by the United States Government. Excusable neglect would carry the premise for the court to consider the habeas timely filed through the deposit of same in the United States Postal Service with adequate postage.

Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379 (1988), gives guidance to prisoners in filing pleadings *pro se*. Such a rule protects prisoners, even if attorneys for a

litigant file a legal document through the mail on their behalf. To construe ***Lack*** so narrowly, as to not allow attorneys similar latitude, misconstrues the Supreme Court's interest in ensuring that prisoners receive an entitlement to the relief that they seek and access to the courts by depositing said documents for relief in proper depositories for mailing with proper postage. It is clear that such stamp must be on or before the actual filing date.

There is nothing in ***Lack***, supra, that suggests that a lawyer, in doing the same thing that is required under the "mailbox rule" on behalf of a pro se litigant, is penalized, along with the litigant, for following the mailbox rule. To penalize an attorney for complying with the mailbox rule because they are "attorneys" and not "prisoners" would seem completely in contravention to the principle of the mailbox rule as a whole. The defendant would also suffer detriment if he relied on counsel's reliance on the courts information without notice of any other applicable rule.

Huerta entrusted his case to an attorney who exercised due diligence on his behalf in complying with any perceived rules and instructions for filing his habeas petition. In doing so, such reliance is no different than reliance on filing through a prison system as a *pro se* litigant. Nothing in the ***Lack*** decision narrows the concern over a prisoner's expectations in filing a document timely, via counsel, to the best of their ability.

The rules of procedure are themselves not dispositive of this issue. See Rules 5 and 6 of the Federal Rules of Civil Procedure. Nothing in Rules 5 and/or 6 compels the conclusion that **receipt** by the clerk of the district court is the moment of filing. The conclusion that **mailing** the document addressed to the clerk of court could also be construed as "filing". The lower courts have, in fact, also

held that receipt by a district judge[11], or at the former address for the district court clerk[12] can be the moment of filing. ***Lack*** at 275.

Since no local rule dictated any different interpretation of compliance than what was reasonably relied on, **Huerta** should not be punished accordingly by denying his habeas review.

Additionally, Federal Rules of Civil Procedure Rule 83 states:

> "(a) **Local Rules**
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> (1) Each district court, acting by a majority of its district judges, may, after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice. A local rule shall be consistent with - but not duplicative of - Acts of Congress and rules adopted under 28 U.S.C. 2072 and 2075, . . .
>
> (b) **Procedures When There is No Controlling Law**
>
> A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. 2072 and 2075, and local rules of the district. **No sanction or other disadvantage may be imposed for**

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[11] **Halfen v. United States**, 324 F.2d 52, 54 (CA10 1963). See also Rule 5(e), Federal Rules of Civil Procedure.

[12] **Lundy v. Union Carbide Corp.**, 695 F.2d 394, 395, n.1 (CA9 1982).

> noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement."

In the 1995 Amendments to Subdivision (b), it states, "This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. 2072 and 2075, and with the district local rules....Some courts regulate practice through the published Federal Rules and the local rules of the court.... There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular court unless the party or attorney has actual notice of those requirements...."

Huerta had no notice other than the clerk's statement of which reliance was reasonable. Thus, the mailing rule can be applied, in that **Huerta** entrusted his case to his attorney to file timely, and reasonably believed such would occur. Delivery by counsel or the mail service is no different than delivery by the Bureau of Prisons or mail service for *pro se* litigants. The test here is the totality of the circumstances as applied to the mailbox rule.

An appeal can be deemed filed on mailing if the district court, from which the appeal is taken, has adopted a rule which deems a document filed on mailing. See generally, **Placeway Construction Corp. v. United States**, 713 F.2d 726 (C.A.Fed. 1983). Such considerations should attach to the district courts as well. Counsel knows of no rule in the district court rules for the Western District of Texas that

limits the filing time to the date it is received by the district court and not based on the mail.

In Freeman v. United States Postal Service, et. al., 1991 U.S. Dist. Lexis 16787, Case No. 91-C-1459 (Nov. 15, 1991), the court rejected the plaintiff's motion for equitable tolling on the premise that he receive a constructive written notice that he had 30 days to file his complaint from the date his EEOC complaint was denied. Freeman went to the clerk's office of the district court and allegedly showed the letter to the district court clerk, and was advised that he had 90 days to file his complaint in the Federal Court. Such advice was erroneous in light of the constructive notice received by Freeman from the EEOC with the 30 day time limit identified. In the present case, no such constructive notice was received by the court concerning the date in which filing would be perfected other than the date of mailing per the notice received by the clerk. No local rule suggests otherwise. There is no constructive or implied notice that the rejection of a habeas petition would be evidenced if it was not filed, via adequate postage and mailing, on a date prior to the ambiguous court determined final date of filing for persons seeking relief under the AEDPA. Therefore, without some type of constructive notice that mailing the document in advance of the one-year arbitrary time deadline would keep the defendant from being able to determine that such a deadline existed, reliance on the clerk's advice would then be reasonable.

Issue V

WHETHER THE HABEAS PETITION WAS TIMELY FILED BASED ON EQUITABLE TOLLING AND LACK OF NOTICE WHICH

ACTS AS A WAIVER, OR BAR, TO ANY PROCEDURAL DEFAULT.

Based on the totality of the circumstances surrounding the events for which the court determined that the filing of the petition for habeas corpus was not timely, an equitable tolling is warranted to avoid a miscarriage of justice and the violation of one constitutional right to the deprivation of another.[13]

Equitable tolling has been afforded to defendants in private suits and suits against the United States (2255 is a civil action against the United States Government for a number of constitutional deprivations). See **Cooper v. United States Postal Service**, 471 U.S. 1022, 105 S.Ct. 2034 (1985). Here, the Court noted that the federal courts have allowed equitable tolling in situations in which the claimant diligently sought judicial review by filing an effective pleading during the statutory period, as well as in cases in which the complainant had been induced by his adversary to filing after a deadline had passed.

Huerta, and counsel, applied due diligence in perfecting his habeas claim by filing it timely, including contacting the clerk to be assured that stamp mailing with adequate postage would be considered a timely filed document. Even if the AEDPA is construed to have statutory implications of a one-year term of time in which to file a habeas petition from the finality of a sentence, and the passage of the Act, without any consideration for retroactivity, the defendant filing said document in a timely fashion was evidenced by

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[13] Violation of Sixth Amendment right to effective assistance of counsel and a deprivation of habeas corpus relief which would be suspended based upon an ineffective assistance of counsel claim. (See Suspension Clause of the Tenth Amendment.)

the clerk's order and no notice that the method of filing would be inadequate. Thus, equitable tolling is reasonable. The AEDPA also does not have any express language defining what constitutes a filing.

Initially, the set of facts in this case prove that **Huerta**, through counsel's due diligence to file a timely pleading, was exercised. A complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim. See **Conley v. Gibson**, 355 U.S. 41, 78 S.Ct. 99 (1957). See also **Super Mail Cargo, Inc. v. United States**, 68 F.3d 1204 (N.D.Cal. 1996).[14]

Equitable tolling is available and courts regularly consider five (5) factors when determining whether to invoke the doctrine:

(1) Lack of actual notice of filing requirement (Appellant lacked complete notice of any filing requirement different from what was done in filing the motion before the one-year arbitrary date of the passage of the AEDPA through adequate postage in the United States Mail);

(2) Lack of constructive notice of filing requirement (there is no notice in the district court rules suggesting that the manner and means in which the case was filed was incorrect);

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[14] This is not a case of erroneous advice from counsel where equitable tolling might not apply. See **Gilbert v. Secretary of Health and Human Services**, 51 F.3d 254 (D.C. Cir. 1995). This is the circumstances where the attorney applied due diligence and the proper procedure as notified by the clerk of the court, therefore, a bar to any equitable tolling claim would not be supportable.

(3) Diligence in pursuing one's rights (all due diligence was initiated, including a telephone call to the clerk's office to ensure that counsel did not have to mail the document overnight);

(4) Absence of prejudice to the defendant (since the prejudice is obvious in the deprivation of both the Sixth Amendment and a Tenth Amendment right, equitable tolling applies); and

(5) Reasonableness of plaintiff's ignorance of the notice requirement (it is reasonable to believe that neither counsel, and particularly the defendant, would have known that the filing requirements were different than what was investigated). Citing **Andrews v. Orr**, 851 F.2d 146, 151 (6th Cir. 1988).[15] Even excusable ignorance is a factor where equitable tolling would allow for timely filing. **Parkins v. Brown, Secretary, Department of Veteran Affairs, Veterans Administration**, Civil No. 94-357-JD (1995), U.S. District Lexis 7287, decided May 26, 1995. Therefore, **Huerta** should be afforded the protection of the equitable tolling and lack of proper notice to any other form of filing other than what was perfected.

Issue VI

WHETHER THE HABEAS CORPUS PETITION ITSELF COULD BE DENIED BASED UPON THE VIOLATION OF ONE CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHICH ACTS AS A DEPRIVATION OF ANOTHER CONSTITUTIONAL RIGHT, AS

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[15] See also **United States v. Volk**, 516 F.Supp. at 161-62 (attorney error considered as additional equitable factor).

APPLIED TO THE SUSPENSION CLAUSE OF THE TENTH AMENDMENT.

Huerta filed his habeas corpus motion timely. If the court construed such motion as being untimely filed, then that has to be based upon an ineffective assistance of counsel claim in violation of the **Huerta's** Sixth Amendment rights. Thus, the implication would be by violating Appellant's Sixth Amendment rights, he was deprived of his right to file a habeas corpus petition in violation of the Suspension Clause of the Tenth Amendment which prohibits the suspension of habeas corpus relief except in times of civil unrest. This would also act as a deprivation of a litigant's due process right affecting habeas corpus petitions and the right to file same if the AEDPA has retroactive effect from April 24, 1996.

Ineffective assistance of counsel for allegedly failing to timely file a document would constitute a procedural default for which the defendant is entitled to relief. All that must be shown is cause and prejudice. Since **Huerta** had the right to access the courts, and the constitutional right to file a habeas petition, even with the AEDPA, such untimely filing, whether based on deliberate indifference or a rule of law not known or adequately followed by a defense attorney, would result in ineffective assistance of counsel, thus creating cause and prejudice to the defendant.

Generally, the existence of cause for procedural default will turn on whether the convicted person that seeks §2255 relief can show that some objective factor, external to the defense, impeded efforts to comply with the procedural rule violated. See **McClesky v. Zant**, 499 U.S. __, 111 S.Ct. 1454 (1991), and **Murray v. Carrier**, 477 U.S. 478, 106 S.Ct. 2639 (1986).

For example, a procedural default would be default that was committed by an attorney in rendering ineffective assistance of counsel, the factual or legal basis for a claim was not reasonably available at the time of the default, or the interference by government officials made compliance of the procedural rule impracticable. See **McClesky v. Zant**, supra.; **United States v. Shaid**, 937 F.2d 228 (5th Cir. 1991) (change in law amounts to sufficient cause for failing to object only if the change is so novel that its legal basis was not reasonably available or foreseeable at the time of the trial). In Appellant's case, there is no reasonable notice that there was a change in filing requirements. This impediment of the AEDPA presents novel legal questions and conflicts, and if an untimely filing is construed, then ineffective assistance of counsel cannot bar a petitioner from filing his habeas petition as a result of lack of foreseeability and understanding that such a legal basis existed for the said denial. **Green v. United States**, 880 F.2d 1299 (11th Cir. 1989) (ineffective assistance of counsel constitutes cause).

If any default in failing to file **Huerta**'s petition timely is evidenced, then it was committed by an attorney rendering ineffective assistance of counsel. Thus, procedural default, based on ineffective assistance of counsel, would allow for the court to address the substantive issues of the habeas petition. The actual prejudice refers to some harm, in addition to presumptive harm, that always occurs when a basic right is violated. In this cause of action, **Huerta** would be deprived of his right to access the courts and to file a habeas petition. Any ineffective assistance of counsel claim for failing to file properly would result in a deprivation of a Sixth Amendment right which would then act to violate the Tenth Amendment in denying **Huerta** the ability to file a habeas petition based on ineffective assistance of counsel.

Such deprivation acts as a suspension of habeas violation of another review based on constitutional right.

Issue VII

IF THE HABEAS CORPUS PETITION IS CONSTRUED TO HAVE BEEN UNTIMELY FILED, DOES IT RESULT IN A VIOLATION OF THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, THUS IMPLICATING SECTION 105(4) OF THE AEDPA WHICH WOULD THEN APPLY AS A CONSTITUTIONAL IMPEDIMENT TO HABEAS CORPUS RELIEF?

Section 105(4) of the AEDPA states that a defendant has a one-year time frame in which to file a habeas corpus petition from the latter date of the time frame in which due diligence was performed, or the event could not have been discovered through the exercise of due diligence. If the AEDPA has retroactive effect, and has a one-year time frame from April 24, 1996 from which to file same for "old law" cases that had not previously filed such documents until after the Act, then none of this would have been known soon enough to protect the defendant's rights without filing the petition in the manner and means in which it was done. Once the court made the determination that such filing was untimely, then, and only then, could the defendant have recognized such error was based upon ineffective assistance of counsel in violation of his Sixth Amendment right. Therefore, even exercising due diligence, the defendant would not have been able to address this question until such time as it had been addressed by the district court. In doing so, and the defendant becoming aware of such concern, under the AEDPA (again assuming retroactive effect) would be entitled to, pursuant to this due

diligence discovery, one year from the date of the ineffective claim being evidenced in which to file his habeas petition based upon a violation of his Sixth Amendment right to effective assistance of counsel. The cause and prejudice of such being the case was untimely filed based on counsel's error and/or detrimental reliance on the clerk's advice. See **Strickland v. Washington**, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2064-65, 2068, 80 L.Ed.2d 674 (1984).

It would be impermissible to deny **Huerta** his right to habeas corpus relief based upon a violation of a constitutional right under the Sixth Amendment to effective assistance of counsel. Once an ineffective assistance claim on filing a habeas petition is perfected, there is an implication that Section 105(4) of the AEDPA would apply and **Huerta** would have one year from the date the impediment was evidenced. The impediment would be the ineffective assistance of counsel claim for failing to file a timely § 2255 petition. Such inconsistent dueling constitutional rights cannot withstand due process protections. **Huerta** is entitled to his habeas relief based on ineffective assistance of counsel if counsel's error, or detrimental reliance on the clerk's advice, caused the untimely filing of the habeas petition.

Issue VIII

HUERTA WAS SENTENCED TO THREE LIFE TERMS OF IMPRISONMENT CONCURRENT WITH EACH OTHER AND FOUR THIRTY YEAR SENTENCES CONCURRENT WITH EACH OTHER AND THE LIFE SENTENCES IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE, WHERE THE PREDICATE OFFENSES WERE LESSER INCLUDED

OFFENSES OF THE RICO SUBSTANTIVE OFFENSE.

It is submitted, that **Huerta** was sentenced to multiple terms of imprisonment in violation of the Double Jeopardy Clause of the Constitution of the United States. The Double Jeopard Clause protects a defendant from the "risk" of being punished twice for the same offense. See **Abney v. United States**, 431 U.S. 651, 660 (1977) (double jeopardy challenges appealable, because the Fifth Amendment guarantees that no person shall, "...be subject for the same offense to be twice put in jeopardy of life or limb.") Double jeopardy issues arise where two offenses are considered "the same offense", and a determination is required where there is multiple prosecutions for related acts or single prosecution involving multiple charges and punishments. See **United States v. Crawford**, 52 F.3d 1303, 1306 (5th Cir. 1995), and **United States v. Osunegbu**, 822 F.2d 472, 481 (5th Cir. 1987) (conviction on two counts of possession of stolen mail based on one criminal opportunity of two separate packages barred even if sentences run concurrently, since crime constituted only one offense).

The test to determine whether multiple prosecutions for a single act constitute prosecution for the same offense, is governed by **Blockburger v. United States**, 284 U.S. 299 (1982).

Under the **Blockburger** test double jeopardy bars successive prosecutions for greater or lessor included offenses. See **Payne v. Virginia**, 468 U.S. 1062 (1984) (per curiam), **United States v. Huerta-Balderas**, 11 F.3d 1218, 1225 (5th Cir.) cert. denied 114 S.Ct. 2138 (1994) (double jeopardy bars convictions for drug conspiracy and CCE, because conspiracy lesser included offense). A lesser

included offense is one that does not require proof of elements beyond those required by the greater offense. See **Brown v. Ohio**, 432 U.S. 161, 167 (1977) (conviction for auto theft reversed because barred by guilty plea and sentence for lesser included offense of joy riding). To ascertain what maybe a lesser included offense, courts examine the statutory elements of the offense, rather than the evidence produced at trial. See **United States v. Tolliver**, 61 F.3d 1189 (5th Cir.) *petition for cert filed*.

The **Blockburger**, test determines what constitutes the, "same offense" in single prosecutions involving multiple charges and punishment, if whether or not the legislative intent to impose multiple charges or punishments is ambiguous. Multiple charges and punishments in a single prosecution will not violate double jeopardy if Congress intended to impose punitive punishments. Intent is established, where two offenses require proof of different elements or when clearly expressed by legislative intent that supports the imposition of cumulative punishments. See **Missouri v. Hunter**, 459 U.S. 359 (1983); **United States v. Martinez**, 950 F.2d 222 (5th Cir.) cert. denied, 504 U.S. 926 (1992); **United States v. Brown**, 29 F.3d 953 (5th Cir.) cert. denied, 115 S. Ct. 587 (1994); **United States v. Crawford**, 52 F.3d 1303 (5th Cir. 1995); **United States v. Munoz-Romo**, 989 F.2d 757 (5th Cir. 1993), and **United States v. York**, 888 F.2d 1050 (5th Cir. 1989).

It is asserted that the Double Jeopardy Clause prohibits the government from arbitrarily subdividing one conspiracy into several and then prosecuting a defendant for what essentially constitutes a single course of conduct. See **United States v. Deshaw**, 974 F.2d 667 (5th Cir. 1992). The Fifth Circuit in **Deshaw**, held that double jeopardy considerations do not preclude successive prosecutions for

narcotics conspiracy and RICO conspiracy charges. In **Deshaw**, the Fifth Circuit held that a prior prosecution for drug importation and distribution conspiracies under Title 21 U.S.C. §§ 963 and 846, did not pose a double jeopardy bar to a subsequent prosecution for a RICO conspiracy charge under Title 18 U.S.C. § 1962(d), when based on the same conduct. Id. at 671; accord **United States v. Huerta**, 921 F.2d 1530 (11th Cir.) cert. denied, 502 U.S. 827 (1991).

Applying the two-step analysis employed in **Garrett v. United States**, the Fifth Circuit first concluded charged "are intended to deter two different kinds of activity, i.e., conspiracy to engage in racketeering as opposed to conspire to violate narcotic laws, [which] indicates that Congress intended RICO conspiracy to be separate offense from the predicate act of a narcotics conspiracy."

Addressing the second step of the **Garrett** inquiry, which examines whether the Double Jeopardy Clause permits successive prosecutions for narcotic conspiracies and a RICO conspiracy, the Court determined, that the offenses have different statutory elements, and therefore did not satisfy the **Blockburger**, "same elements" test. As a result of **Rutledge**, supra., that the sentencing of **Huerta** to concurrent life and thirty year terms of imprisonment, with a special assessment of $50.00 per each count, represents a viable argument for double jeopardy consideration.

To be convicted of RICO, Title 18 U.S.C. § 1962(c), we note the following elements must be proved beyond a reasonable doubt:

First: That the defendant was associated in an "enterprise" as defined (enterprise includes any partnership,

corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity);

Second: That the defendant knowingly and willfully committed, or knowingly or willfully aided and abetted the commission of at least two of the predicate offenses specified;

Third: That the two predicate offenses allegedly committed by the defendant were connected with each other by some common scheme, plan or motive so as to be a pattern of criminal activity and not merely a series of separate isolated or disconnected acts:

Fourth: That through the commission of the two or more connected offenses the defendant conducted or participated in the conduct of the "enterprise's" affairs'; and

Fifth: That the "enterprise" was engaged in or its activities affected, interstate commerce.

With respect to sustaining a conviction on a RICO conspiracy, Title 18 U.S.C. §1962(c), the following elements must be proved beyond a reasonable doubt:

First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, namely, to engage in a "pattern of racketeering" as charged in the indictment;

Second: That the defendant knowingly and willfully became a member of such conspiracy; and

Third: That at the time the defendant knowingly and willfully agreed to join in such conspiracy, he did so with the specific intent either to personally participate in the commission of two "predicate offenses," as elsewhere defined or that he specifically to otherwise participate in the affairs of the "enterprise" with the knowledge and intent that other members of the conspiracy would commit two or more "predicate offenses" as a part of a "pattern of racketeering" activity.

With respect to sustaining a conviction for conspiracy to distribute and possess with intent to distribute narcotics in violation of Title 21 U.S.C. §§ 841 and 846, the following elements must be proved beyond a reasonable doubt:

First: That two or more persons in some way or manner came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment; and

Second: That the defendant knowingly and willfully became a member of such conspiracy.

Under **Rutledge**, supra, it is submitted that there has been an expansion/clarification of the double jeopardy application issue, that is, when a defendant is prosecuted under CCE §848, and where there exists predicate narcotic conspiracy violation(s) of §846, it is now clear that the sentencing to a term of imprisonment on the lesser included conspiracy offense(s) is prohibited. The **Rutledge** Court held, that it is presumed that a legislature does not intend to impose two punishments, where two statutory provisions proscribe the "same offense", the test for determining whether there are two offenses, is whether each of the statutory provisions requires proof of a fact which

the other does not, **Blockburger**, supra at 304. The **Rutledge** Court concluded, that two statutes defined the "same offense" where one is a lesser included offense of the other. The **Rutledge** Court resolved definitively that a guilty verdict on a §848 charge necessarily includes a finding that the defendant also participated in a conspiracy., therefore is a lesser included offense of CCE.

Huerta asserts that RICO, like CCE, is congruent in terms and in interpretation, regarding the consequence of predicate offenses (at least two), which therefore subsume the lesser included offense criteria. The **Rutledge** Court reasoned, that under the provisions of CCE §848, the "in concert" requirement to sustain a conviction (as set forth in **Jeffers v. United States**, 432 U.S. 137 (1977)), signified mutual agreement in a common plan or enterprise, including a finding that the defendant also participated in a conspiracy, therefore a lesser included offense. We assert, that the substantive RICO offense under § 1962(c), includes conduct where defendants are associated with an "enterprise", which included "any" partnership, association, with any union or group of individuals associated in fact. The term "pattern of racketeering activity", predicate offenses, we assert, therefore includes individuals who are co-conspirators and "partners", and are in fact, "in concert", which signifies mutual agreement in a common plan or enterprise, as discussed in **Rutledge**, supra. Therefore, as in **Rutledge**, because of the plain meaning of Title 18 U.S.C. §1962(c), of "enterprise", which includes any partnership and/or association, is equivalent to the, "in concert" criteria for a CCE, that where the phrase signifies a mutual agreement in a common plan or enterprise, that a guilty verdict on a §1962(c), charge necessarily includes a finding that the defendant also participated in a conspiracy violative of predicate conspiracy counts, and therefore conspiracy is the lesser included offense of CCE.

Additionally, an element to sustain a conviction under §1962(c), requires that, "**That the two predicate offenses allegedly committed by the defendant were connected with each other by some common scheme, plan, or motive so as to be a pattern of criminal activity, and not merely a series of separate, isolated, or disconnected acts.**" It is argued that, where the predicate acts were connected with each other and committed by the defendant by a common scheme as to be a pattern of criminal activity, the resultant is an "enterprise", which in turn by definition produces a conspiratorial "partnership." It is argued that, as in **Rutledge**, with respect to CCE convictions, that conspiracies under the RICO Conspiracy Offense §1962(d), and where an element requires, two or more persons with a mutual understanding to accomplish a common unlawful plan, to engage in a "pattern of racketeering activity" meets the **Blockburger** test for purposes of double jeopardy. Additionally, the same argument applies with respect to the predicate offense in **Huerta's** conviction of violation of Title 21 U.S.C. § 846, Conspiracy to Distribute Heroin.

Therefore, as articulated in the argument above, we proposition that as in the **Rutledge** decision, that where a defendant is found guilty on both a CCE and a conspiracy count based on the same agreements, that if a defendant is sentenced on RICO and predicate conspiracy counts it is violative of the Double Jeopardy Clause. We assert, that a defendant should not be punished twice for the "same offense." As in **Rutledge**, supra, the, "language of a § 848, "restricts the definition of the crime to a continuing series of violations undertaken by the accused 'in concert with five or more other persons.'", the RICO language of § 1962(c), requires that at least two individuals participate in an unlawful "enterprise" partnership, which by definition generally is connoted as a cooperative agreement and

conspiracy. Thus, where the word "concert" commonly signifies agreement of two or more persons in a common plan or "enterprise" we offer the theory in recognition of **Rutledge**, that the RICO conspiracy offense, and predicate conspiracies are the lesser included offenses of the RICO substantive offense, which if convicted and sentenced to a term of imprisonment is violative of the Double Jeopardy Clause.

Issue IX

MOVANT WAS TRIED AND CONVICTED UPON EVIDENCE THAT IN PART WAS TAINTED BY ILLEGAL AND UNCONSTITUTIONAL BEHAVIOR OF LAW ENFORCEMENT AUTHORITIES, IN VIOLATION OF HUERTA'S RIGHT TO DUE PROCESS.

Huerta was tried and convicted in part upon tainted testimony and evidence, produced by San Antonio Police officials. We present, that there was a pattern of misconduct by San Antonio Police officials, including Detective Daniel Falcon, who participated in the investigation of **Huerta**. San Antonio Police Detective Daniel Falcon was charged in July, 1994, two months after **Huerta** was sentenced to three life terms of imprisonment, and four thirty year concurrent sentences. Falcon was a nine year veteran with the San Antonio Police Narcotics Division, and was arrested on charges that he distributed "crack" cocaine, reportedly on June 28, 1994. Falcon was indicted by a federal grand jury for Conspiracy and Possession With Intent to Distribute Crack Cocaine, and Aiding and Abetting in The Distribution of Crack Cocaine. Falcon proceeded to trial in October of 1994, the indictment on July 20, 1994. The indictment of Falcon

charged, that he directed a confidential informant to place rock cocaine under a washing machine outside of JoAnn Valdez's (Falcon's common law wife) residence. In addition to the charge of conspiracy to possess and distribute cocaine, aiding and abetting, he was also charged with conspiracy to violate Valdez's civil rights. Reportedly Falcon "setup" Valdez due to a dispute and custody battle over their daughter Christina. The "setup" of Falcon's wife by planting crack cocaine was to have her appear as an unfit mother and to gain custody of their child.

Falcon subsequently was convicted and sentenced to a prison term, and we present, that his criminal behavior with respect to his child custody battle with his wife was indicative of police misconduct and a lack of professional standards in the San Antonio Police Department, with respect to **Huerta's** case.

We present that **Huerta** was denied due process in recognition of police misconduct that has been well documented within the San Antonio Police Department, prior to, during, and after **Huerta's** investigation, trial, and sentencing.

The existence of police misconduct, where individuals are "setup" and where, as a policy, the agency makes public misrepresentations, may deny a defendant due process. See **Hampton v. United States**, 425 U.S. 484 (1976), and **United States v. McQuin**, (9th Cir.) cert. denied, 445 U.S. 955 (1980) (**McQuin** is an example where government agents engineer and direct the criminal enterprise from start to finish). Prosecution is bared, "only when the government's conduct is so grossly shocking and so outrageous as to violate the universal sense of justice." **United States v. Ryan**, 548 F.2d 782 (9th Cir.) cert. denied, 430 U.S. 965 (1977). Prosecution has been bared

where the outrageous misconduct was, in effect, the generation by police of new crimes for the sake of pressing criminal charges against the defendant(s). See **United States v. Twigg**, 588 F.2d 373 (3rd Cir. 1978) (indictment was dismissed where the government, through an informer, provided the location and all necessary chemicals/equipment for methamphetamine lab and informant was in complete charge), and **Green v. United States**, 454 F.2d 783 (9th Cir. 1971) ("We do not believe the government may involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations, and yet prosecute its collaborators.")

We present that in recognition of the number of San Antonio police officers, who were government witnesses against **Huerta**, and in recognition of acknowledged police misconduct, that the government knew or should have known of this activity, and should have advised **Huerta's** attorney of the police misconduct activity during the discovery process. We assert, that had **Huerta's** attorney been advised of the police misconduct, that he could and would have been more effective in the defense of his client. The failure of the government to disclose the misconduct, which it knew or should have known existed was a violation of **Brady**, infra.

We suggest that if the government knew of police misconduct, it then suppressed relevant discovery material, which if it had been produced, **Huerta** would had a significant probability that the requested materials in the hands of his skilled counsel would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. See **United States v. Rosner**, 516 F.2d 269 (2nd Cir. 1975). Additionally, it is presented that had **Huerta's** attorney been given the suppressed material(s)

(police misconduct), **Huerta** would have subpoenaed the responsible officers/witnesses who could have offered exculpatory evidence in his case. Additionally, had **Huerta's** attorney had suppressed materials he would/could have initiated a more complete examination. It is argued, if the government suppressed both Jencks and **Brady** material it denied **Huerta** due process and a fair trial. If the material had been provided, there existed a reasonable probability sufficient to undermine confidence in the outcome. A "reasonable probability" is a probability sufficient to undermine the confidence in the outcome." See **Pennsylvania v. Ritchie**, 480 U.S. 39,57 (1987), and **Miller v. Angliker**, 848 F.2d 1312,1320 (2nd Cir.), cert. denied 488 U.S. 890 (1988).

Huerta argues that if the suppressed discovery material if provided as timely requested, there would have been created reasonable doubt in the minds of the jury, and that there is therefore, a "reasonable probability" that "results of the proceedings would have been different." See **United States v. Bagley**, 473 U.S. 667,682 (1985). We present, that if the suppressed discovery evidence had been provided as requested, that in the hands of **Huerta's** skilled attorney, he would have developed other lines of mitigating inquiry. **Huerta** through counsel timely requested pre-trial discovery from the government pursuant to the Federal Rules of Criminal Procedure, Rules 16, 26.2, 12.1, Title 18 U.S.C. §3500 (Jencks) and **Brady** material (**Brady v. Maryland**, 373 U.S. 83 (1963); **Giglio v. United States**, 405 U.S. 150 (1972) and **United States v. Agurs**, 427 U.S. 97 (1976)). Evidence whose disclosure is required under **Brady** may consist not only of exculpatory evidence but also of impeachment evidence. See **United States v. Bagley**, 473 U.S. 667 (1985). Evidence pursuant to Federal Rules of Criminal Procedure 16(a) is material and subject to discovery by the defendant if the evidence could

be used to counter the government's case or bolster defense. Under **Brady** and its progeny, the government has an affirmative duty to disclose favorable evidence known to it, even if no specific disclosure request is made by the defense. See **Kyles v. Whitley**, 115 S.Ct. 1555, 1565, 1567-68 (1995) (Evidence is material generally if it "...could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." id at 1566). The individual responsible prosecutor is presumed to have full knowledge of all information gathered in connection with the government's investigation. In **Whitley** supra at 1567, we note, "...prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."

In closing, we argue that **Huerta's** right to due process was violated, where law enforcement authorities were involved in illegal activities that may have resulted in **Huerta's** conviction. See **United States v. Russell**, 411 U.S. 423 (1973), and **Hampton**, supra. In federal court, if the government violates a protected right of the defendant, due process principles may bar the government from invoking the judicial process to obtain a conviction. See **Hampton**, supra (if the government's conduct, "reach[ed] a demonstrable level of outrageousness.") *Id.* at 495. Lastly, we argue, that if the government knew or should have known about illegal police activities in the development of **Huerta's** or other target(s) cases, and withheld this information there resulted a **Brady** and discovery violation, that if made known to **Huerta's** trial and or appellate counsel would have resulted in a favorable outcome. The government's responsibility and obligation under **Brady v. Maryland**, 373 U.S. 83 (1963), and **Giglio v. United States**, 405 U.S. 150 (1972), to provide the defense with material exculpatory evidence within the

government's possession, including evidence that could have been used to impeach witnesses credibility, if withheld, violated **Huerta's** right to due process, requiring the vacating of his conviction and sentence. See **United States v. Wallach**, 935 F.2d 445 (2nd Cir. 1991) (convictions reversed because government should have known witness was committing perjury). We argue, that because the government decides whether and when to use witnesses, and if there is a question as to their veracity and or integrity, that the government stands uniquely positioned to guard against perfidy. Therefore, the government's responsibility includes the duty as required by **Gigilo**, supra, to turn over to the defense during discovery all material information casting a shadow on a government witness's credibility.

Issue X

HUERTA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT, TRIAL, AND SENTENCING DUE TO HIS ATTORNEY'S FAILURE TO PROPERLY PREPARE AND CALL WITNESSES THAT COULD MITIGATE THE GOVERNMENT'S CASE.

Huerta was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the Constitution. See Sixth Amendment and **Strickland v. Washington**, 466 U.S. 668 (1984). In **Strickland**, the Supreme Court held that in order to establish a constitutional violation of the right to effective assistance of counsel, a petitioner must meet two prongs. First, he must show that counsel's performance was ***deficient***. This requires a showing that counsel made errors so serious that counsel was not functioning as "counsel" as guaranteed by the Sixth Amendment. This prong is met by showing that counsel's

acts and/or omissions did not meet an objective standard of reasonableness. See **United States v. Smith**, 915 F.2d 959, 963 (5th Cir. 1990) (quoting **Strickland**, 466 U.S. at 688, 104 S.Ct. at 2064). Second, a petitioner must show that he was ***prejudiced*** by counsel's performance. This second prong of the test is met by showing the existence of a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. **Strickland**, 104 S.Ct. at 2068.

It is submitted, that based on the arguments as set forth infra, within this pleading, the standards of **Strickland** are sufficiently met.

The requirement that a defendant receive effective assistance of counsel is constitutionally mandated. U.S. Const. Amend VI; **Reece v. Georgia**, 350 U.S. 85, 90 (1955) (the effective assistance of counsel...is a constitutional requirement of due process of law) and **McMann v. Richardson**, 397 U.S. 759, 771 & n.14 (1970) (the right to counsel is the right to effective assistance of counsel).

It is submitted, that **Huerta's** trial counsel was ineffective. The Sixth Amendment to the Constitution provides in relevant part that, "[I]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The Supreme Court has instructed that "[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the **adversarial system to produce just results**." **Strickland** supra at 685.

In **Strickland**, the Court held that a defendant is required to show (1) deficient performance by counsel, and (2) prejudice to the defense. Id. at 687. The Sixth Amendment guarantees the right to effective assistance of counsel. We suggest, that **Huerta** is deserving of this Court's consideration to vacate and set aside his conviction and sentence, where counsel's performance fell below an objective standard of reasonableness, and where counsel's deficient performance prejudiced the defendant (**Huerta**) resulting in an unreliable and fundamentally unfair outcome of the proceeding.

To vacate **Huerta's** sentence pursuant to Title 28 U.S.C. §2255, he must demonstrate a fundamental defect in the proceedings which inherently result in a complete miscarriage of justice or an error so egregious it violates due process. **Strickland**, supra at 687. We assert, that **Huerta** had made a witness list of over fifty individuals and submitted same to his trial counsel for their participation and mitigation of the government's case. **Huerta's** counsel called only two witnesses in **Huerta's** behalf, which **Huerta** asserts is ineffective assistance of counsel. **Huerta** further asserts, that counsel was ineffective where he failed to investigate or prepare by interviewing expert witnesses, prosecution witnesses, character witnesses, and potentially corroborating witnesses.

Huerta submits that his counsel was ineffective under the **Strickland** standard, due to this failure to interview and call witnesses that could have mitigated the government's case against movant.

CONCLUSION

Habeas corpus cannot be suspended. Restrictions on habeas act as a suspension of all reserved constitutional

rights under the Suspension Clause of the Tenth Amendment. The AEDPA acts as a suspension of such laws when it is applied retrospectively. Even the one year limitation, after the enactment of the Act in application to persons whose cases occurred prior to the Act, and were finalized prior to the enactment of the Act, would subject them to a suspension restriction impeding their Tenth Amendment rights and liberty, undue hardship and serious conflicts of law.

No offender can effectively challenge their case with any limitation in habeas corpus relief. A one year time limit is even questionable if someone is making a claim of innocence after the one year.

WHEREFORE, Huerta prays that this Honorable Court will grant this request for a Certificate of Appealability.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have, this date, mailed a copy of the foregoing, *via Certified Mail*, to the Assistant United States Attorney, **JOSEPH H. GAY, JR.**, United States Attorney's Office, 601 N.W. Loop 410, Suite 600, San Antonio, Texas 78216, by affixing sufficient postage thereon to ensure its delivery.

This 6th day of January, 1999.

Respectfully submitted,

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CASE NO. 98-50301

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir.R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir.R. 32.2.7(b).

1. THIS CERTIFICATE OF APPEALABILITY BRIEF CONTAINS:

A. 13,963 words in proportionally spaced typeface, OR

B. _____ lines of text in monospaced typeface.

2. THE BRIEF HAS BEEN PREPARED (select one):

A. In proportionally spaced typeface using: Software Name and Version: **WORDPERFECT 6.1** in (Typeface Name and Font Size): **CG Times 14 point**, OR

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3. IF THE COURT SO REQUESTS, THE UNDERSIGNED WILL PROVIDE AN ELECTRONIC VERSION OF THE BRIEF AND/OR A COPY OF THE WORD OR LINE PRINTOUT.

4. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN 5TH CIR. R. 32.2.7, MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

5. COUNSEL IS SUBMITTING A DISKETTE CONTAINING THIS CERTIFICATE OF APPEALABILITY FOR THE COURTS CONVENIENCE.

_____

MARCIA G. SHEIN

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50301
USDC No. SA-97-CA-539

U.S. COURT OF APPEALS
FILED
JUN 17 1999
CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HERIBERTO HERBERT HUERTA,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

ORDER:

Heriberto Herbert Huerta has filed a request with this court for the issuance of a Certificate of Appealability (COA). He argues that the district court erred by dismissing his 28 U.S.C. §2255 motion as barred by the applicable one-year statute of limitations. Because Huerta has not made a credible showing that the district court erred, his motion for a COA is DENIED. See Sonnier v. Johnson, 161 F.3d 941, 943 (5th Cir. 1998).

/s/ James L. Dennis
James L. Dennis
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES of AMERICA;	
Respondent - Appellee,	CASE NO.: 98-50301
vs.	CIVIL NO.: SA-97-CA-0537
	D.C. #SA-93-CR-136-(19)
HERIBERTO HUERTA,	
Petitioner - Appellant.	

PETITION FOR REHEARING EN BANC ON DENIAL OF CERTIFICATE OF APPEALABILITY

COMES NOW, Appellant, **Heriberto "Herbert" Huerta**, by and through undersigned counsel, and files this Petition for Rehearing En Banc on this court's denial of the Appellant's Certificate of Appealability on June 17, 1999.

This Honorable Court relied on **Sonnier v. Johnson**, 161 F.3d 941, 943 (5th Cir. 1998), in denying relief to appellant. Such premise is in conflict with constitutional claims of Appellant, the law and the questions of innocence for which Appellant is entitled to habeas corpus consideration. *Sonnier* addresses 2254 petitions and not 2255 petitions. They are substantively different in relationship to the questions of law that are presented to the court. More importantly, because there is a one year time limit, the jurisdiction of that one year time limit is subject to equitable tolling. If not subject to equitable tolling, then Petitioner Huerta, based on procedural

defaults, whether real or perceived, caused by counsel or a third party, could not have controlled those conditions and should not be penalized in not having his underlying claims reviewed. If the underlying claims themselves are not constitutionally meritorious, that is a different question, but to deny him access to the courts via habeas corpus considerations, for procedural default, considering the time limitations of such motions, is to deny him a constitutional right to habeas corpus relief at all. Such also acts as a suspension of the habeas corpus right in violation of the Suspension Clause of the Tenth Amendment.

This court must decide a more equitable outcome to the extent that the Petitioner not be deprived of a constitutional right to not only access the courts, but to have his habeas corpus petition heard. The AEDPA did not protect defendants from procedural default based on counsel error.

The Petitioner has made claims of actual innocence in relationship to his habeas petition and, therefore, should not be deprived of the right to proceed accordingly. *See* **Bounds v. Smith**, 430 U.S. 817, 52 L.Ed.2d 72, 97 S.Ct. 1491 (1977). *See* **Murphy v. Johnson**, 110 F.3d at 11; **Whitehead v. Johnson**, 157 F.3d 384, 387-88; and **Sonnier v. Johnson**, 161 F.3d at 945. The first step of the *Murphy* test is a credible showing of procedural error outside Petitioner's control. The second step is making a substantial showing of a denial of a constitutional claim on the underlying claims of the habeas petition. Petitioner has met the *Murphy* test.

There is no case that states that procedural default by an attorney precludes a defendant from filing a habeas corpus petition. In fact, most of the cases suggest the exact opposite. See **Houston v. Lack**, 487 U.S. 266, 108 S.Ct.

2379 (1988). Therefore, this court must decide if counsel's failure to timely file a petition for habeas corpus relief constitutes a violation of the Fifth and Sixth Amendment, along with the Suspension Clause of the Tenth Amendment. To not do so would substantially prejudice the defendant unless the court decides that the claims in the 2255 are not meritorious in and of themselves on a claim of actual innocence for which Petitioner has structured his original 2255 substantive issues.

ARGUMENTS AND CITATIONS OF AUTHORITY

I. **THE PETITIONER HAS SHOWN THAT CIRCUMSTANCES OUTSIDE OF HIS CONTROL WERE THE CAUSE FOR PROCEDURAL DEFAULT IN FAILING TO FILE A TIMELY 2255 PETITION.**

a. **PETITIONER SHOULD NOT BE DEPRIVED OF HIS RIGHT OF HABEAS REVIEW DUE TO COUNSEL ERROR IN NOT FILING THE DOCUMENT TIMELY;**

b. **AN ATTORNEY CANNOT BE THE CAUSE OF THE PETITIONER'S DEPRIVATION OF A RIGHT ESTABLISHED BY THE CONSTITUTION;**

c. **SUCH PROCEDURAL DEFAULT ACTS AS A SUSPENSION OF THE *GREAT WRIT* IN VIOLATION OF THE SUSPENSION CLAUSE OF THE TENTH AMENDMENT; and**

d. THAT SUCH CONDITIONS MAY DEPRIVE A PETITION OF IMPORTANT LIBERTY INTERESTS.

While there is no exhaustive list of circumstances to justify a finding of cause, the Supreme Court has made clear that such a finding turns on whether the petitioner can show that some objective factor external to the defense impeded counsel's efforts to comply with the procedural rule. See Murray v. Carrier, 477 U.S. 478, 488 (1986). All of these cases were before the AEDPA and the one year time limitation established by same. As such, reconsideration/review of these pre-AEDPA cases should be considered.

This court must decide if a habeas corpus petition can be denied due to real or perceived procedural error of an attorney's outside the control of the Petitioner in violation of the Fifth, Sixth and Tenth Amendment rights. Such denies the Petitioner meaningful access to courts in violation of the Fifth and Sixth Amendment, and *Bounds, supra*; such acts as a suspension of the *Great Writ* in violation of the Suspension Clause of the Tenth Amendment; such can result in a sentence or conviction that deprives a Petitioner of important liberty interests protected by the aforementioned constitutional amendments.

Traditionally no defendant can claim an ineffective assistance of counsel claim on the substantive contents within a 2255. Since the AEDPA, and the one year time limit, restrict the filings of habeas petitions, procedural default caused by something out of the control of the Petitioner would act as a suspension of the right to file same, and creates greater consequences to a person's freedom and potential innocence. Such would also cause

prisoners to languish in prison on grounds of legal error which could reduce a sentence or overturn a conviction or actual innocence. Such is not the intended result of the jurisdictional restrictions of the AEDPA.

Counsel states that the procedural default was based upon excusable neglect and due diligence. The petitioner had no control over either of these factors and should not be punished for same. The Petitioner was unable to file his habeas corpus petition because of an external impediment for which he had no control. *See* **Houston v. Lack**, 487 U.S. 266, 273 (1988). Counsel, whether real or perceived, attempted to submit the habeas petition timely in accordance with what counsel understood to be the factors necessary to comply with the rules governing such considerations. There is no case law establishing what constituted a reasonable time in which to file a habeas petition, after the AEDPA was passed, until June, 1997 in **Lindh v. Murphy**, 96 F.3d 856, 866 (7th Cir. 1996) (en banc) *reversed in part*, __ S.Ct. __, 1997 WL 338568 (June 23, 1997). The AEDPA itself was not a model of clarity on this issue and it was left up to arbitrary interpretation to determine the one year time restriction, as well as what would constitute a filing relevant to same. Even if this is of no consequence, the question before this court is too serious to ignore relative to protecting the Petitioner from the suspension of his right to habeas review based on a procedural default outside the prisoner's control.

The impediment for which counsel relied was in attempting to address how, under the AEDPA, the District Court would accept filings of such petitions. In doing so, counsel relied on what was reasonable and consistent with the rules that had governed previous filings on motions, or petitions, or appeals that have jurisdictional time constraints. Counsel would never had known that such

filings were wrong until the district court made that determination. There is no notice suggesting any other disposition. Ultimately, this impediment affected the petitioner who could not raise, and kept him from raising, his claims through no fault of his. See *Murray*, 477 U.S. at 488. Clearly, Petitioner has shown cause for the impediment and procedural default. He should not be punished for this conflict. This is not a substantive claim of ineffective assistance of counsel but a procedural issue.

Counsel made all efforts to comply with what rules were known. No new rules had been established after the AEDPA in terms of expectations of filing, and that mailing, prior to the deadline, would not be sufficient. How would the Petitioner know this if counsel was unaware? If counsel is determined to be ineffective in failing to properly file, then the Petitioner should not be penalized.

The finding of prejudice is dependent upon the particular facts of a case. The Petitioner can show that the error, whether perceived or real, worked to his actual and substantial disadvantage in effecting his constitutional rights as asserted under the substantive issues of the 2255. See **United States v. Frady**, 456 U.S. 152 (1982). In addition, there is a fundamental miscarriage of justice based on the procedural default in that the Petitioner has been denied access to the courts, as well as not being given the opportunity to have the merits of his case reviewed. *See Murphy, supra*. This all acts as a suspension of Petitioner's habeas corpus rights in violation of the Suspension Clause of the Tenth Amendment. Such constitutes a fundamental miscarriage of justice. See **Coleman v. Thompson**, 501 U.S. 722 (1991). The Petitioner claims that his constitutional rights have been violated to the extent that he may be innocent, and he is being punished while in custody for errors in law, fact and constitutional. As such,

no counsel can deprive the Petitioner, through a procedural default, of his access to the courts. This acts as an impediment to the Petitioner and violates numerous constitutional rights. This same standard would apply to anyone who is subject to death penalty considerations. The Petitioner is subject to life imprisonment. There is no difference between the two in that if an attorney fails to file a habeas corpus petition pursuant to 28 U.S.C. 2254 within the one year time frame after the exhaustion of state remedies on a death penalty case, is the petitioner denied such review even if they are innocent. There is no logic to this reasoning.

A Petitioner may gain federal review of an otherwise procedurally defaulted claim if he can demonstrate both cause excusing the default and the actual prejudice resulting from the bar. **Murray v. Carrier**, 477 U.S. 478, 485, 106 S.Ct. 2639 (1986). *See* **Wainwright v. Sykes**, 433 U.S. 72, 87, 97 S.Ct. 2497 (1977). Second, in extraordinary cases, a federal habeas court may grant the writ without a showing of cause and prejudice to correct a fundamental miscarriage of justice. *See* **Engle v. Isaac**, 456 U.S. 107, 135, 102 S.Ct. 1558 (1982) "A constitutional violation that has probably resulted in a conviction of one that is actually innocent may be excused for procedural default." *Carrier* at 496. The Petitioner's substantive claims on his habeas corpus, listed below, established both cause and prejudice to correct a fundamental miscarriage of justice.

A. Movant was sentenced to three life terms of imprisonment concurrent with each other and four thirty year sentences concurrent with each other and the life sentences in violation of the double jeopardy clause, where the predicate offenses were lesser included offenses of the RICO substantive offense.

B. Movant was tried and convicted upon evidence that was tainted in part by illegal and unconstitutional behavior of law enforcement authorities, in violation of Huerta's right to due process.

C. Movant was denied effective assistance of counsel at trial, and sentencing due to his attorney's failure to properly prepare and call witnesses that could mitigate the government's case.

WHEREFORE, Petitioner prays that this Honorable Court will grant this request for en banc review to determine whether an attorney's procedural default, "whether real or perceived," can be the cause of a defendant's inability to access the courts for review of a habeas corpus petition based on circumstances outside the control of that defendant, and whether or not such conditions violate the Fifth, Sixth and Tenth Amendments, as well as significant liberty interests.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have, this date, mailed a copy of the foregoing, *via Certified Mail*, to the Assistant United States Attorney, **JOSEPH H. GAY, JR.**, United States Attorney's Office, 601 N.W. Loop 410, Suite 600, San Antonio, Texas 78216, by affixing sufficient postage thereon to ensure its delivery.

This 29th day of July, 1999.

Respectfully submitted,

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CASE NO. 98-50301

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir.R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir.R. 32.2.7(b).

1. THIS DOCUMENT CONTAINS:

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5. COUNSEL IS SUBMITTING A DISKETTE CONTAINING THIS CERTIFICATE OF APPEALABILITY FOR THE COURTS CONVENIENCE.

_____

MARCIA G. SHEIN

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
AUG 17 1999
CHARLES R. FULBRUGE III
CLERK

No. 98-50301

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HERIBERTO HERBERT HUERTA,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas, San Antonio

Before DAVIS, EMILIO M. GARZA and DENNIS, Circuit Judges.

BY THE COURT:

A member of this panel has previously denied appellant's motion for certificate of appealability. After consideration by this panel upon request of appellant, IT IS ORDERED that appellant's petition for rehearing en banc on denial of certificate of appealability, treated as motion for reconsideration is denied.

MOT-29